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No. 09-

IN THE

# Supreme Court of the United States

DEMARICK HUNTER,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, under *Begay v. United States*, 128 S. Ct. 1581 (2008), a prior conviction for carrying a concealed weapon constitutes a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

2. Whether a legally erroneous application of ACCA, which resulted in a mandatory minimum sentence five years above the otherwise applicable statutory maximum for the offense, violates due process.

3. Whether the decision of the Eleventh Circuit denying a certificate of appealability ("COA") on habeas review should be summarily reversed when the Solicitor General has confessed that it was error to deny the COA.

## PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption.

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## OPINIONS BELOW

The decision of the Eleventh Circuit denying petitioner's motion for a certificate of appealability ("COA") after remand from this Court is reported at *United States v. Hunter*, 559 F.3d 1188 (11th Cir. 2009). App. 1a-4a. The Eleventh Circuit's earlier denials of the COA are not reported. App. 5a, 7a, 8a. The district court's denial of habeas relief, and its denial of a COA, are not reported. App. 9a, 10a.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 24, 2009. App. 1a-4a. On May 6, 2009, Justice Thomas extended the time to file a petition for a writ of certiorari to and including June 24, 2009. On June 12, 2009, he granted a further extension to and including July 24, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in

> section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Title 28 U.S.C. § 2253, governing appeals in a habeas proceeding, provides in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . .
>
> . . .
>
> (B) the final order in a proceeding, under section 2255[.]
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## STATEMENT OF THE CASE

This petition represents the second time petitioner Demarick Hunter has sought relief from this Court to correct a concededly unlawful sentence that more than tripled his term of imprisonment. In a misapplication of the Armed Career Criminal Act ("ACCA"), Hunter was sentenced under its mandatory minimum provisions to 188 months in prison, based upon a ruling that his two prior convictions

for carrying a concealed weapon were "violent felonies" under ACCA. The Solicitor General has acknowledged that that holding was in error under *Begay v. United States*, 128 S. Ct. 1581 (2008). All of the other circuits that have ruled on the issue have held that firearm possession does not qualify as an ACCA predicate offense. And the Eleventh Circuit itself has since agreed. But the court below again refused to grant Hunter a certificate of appealability ("COA") to raise the error on habeas review, even after this Court vacated and remanded its earlier denial. The Eleventh Circuit's misguided efforts to preserve an admittedly unauthorized and unjust sentence should be firmly rejected by this Court. This is the rare case in which summary reversal is the only appropriate remedy.

1. On June 8, 2004, following a jury trial in the United States District Court for the Southern District of Florida, Hunter was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Hunter had been a passenger in a vehicle on the evening of August 15, 2003, in Miami-Dade County, Florida, when the vehicle was stopped by the police for a possible traffic violation. In the course of the traffic stop, the police observed an empty gun holster in the back seat of the vehicle where Hunter had been seated, and a gun beneath the right front passenger seat. At trial, the driver of the vehicle testified that Hunter had thrown a gun onto the right front passenger seat before he had pulled over and that the other passenger had attempted to conceal the weapon under that seat. It was also established at trial, by stipulation of the parties, that Hunter had a prior felony conviction.

The dominant legal concern at sentencing was Hunter's criminal history. Without the application of any sentencing enhancement under ACCA, Hunter faced a statutory sentencing range of zero to 10 years. 18 U.S.C. § 924(a)(2). Hunter, however, had two prior convictions in 1996 and 1999 for carrying a concealed firearm and one prior conviction in 2001 for possession with intent to sell or deliver cocaine. The district court decided that these three prior convictions qualified as "violent felonies" or "serious drug offenses" under ACCA, which made Hunter subject to a 15-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). These predicate offenses therefore added a *minimum* of 5 years to Hunter's statutory exposure.

The court also determined that the predicate offenses constituted "crimes of violence" or "controlled substance offenses" under the Sentencing Guidelines.[1] Accordingly, Hunter's offense level was set at 33 because of his three prior felony convictions, including the concealed weapons offenses. U.S.S.G. § 4B1.4(b)(3)(B). Hunter also had a criminal history category of IV. U.S.S.G. § 4A1.1. Based upon an offense level of 33 and a criminal history category of IV, Hunter's applicable Guidelines range was 188 to 235 months.[2]

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[1] The definitions of "violent felony" under ACCA and "crime of violence" under the Sentencing Guidelines are identical in relevant part. Both apply to "any crime punishable by imprisonment for a term exceeding one year . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a); *see also United States v. Townsley*, No. 08-13517, 2009 WL 929986, at *2-3 (11th Cir. Apr. 8, 2009) (unpublished).

[2] The sentencing calculations detailed above and in footnote 3 are based upon the figures in the government's appellate

The district court sentenced Hunter to 188 months, which was at the low end of the Guidelines range and also met the 15-year mandatory minimum term required by ACCA. If Hunter's prior concealed weapon convictions had not been treated as predicate offenses for purposes of ACCA, or aggravating factors under the Sentencing Guidelines, Hunter would have been subject to a Guidelines range of 63-78 months—more than 10 years less.[3] Indeed, Hunter, who has been in custody since his arrest in August 2003, has now served nearly six years in prison, which already may exceed the lawful sentence.

2. Hunter appealed his conviction and sentence to the Eleventh Circuit. He challenged his sentence on the ground that the mandatory minimum sentence violated the constitutional holding in *United States v. Booker*, 543 U.S. 220 (2005). The Eleventh Circuit affirmed.

Hunter did not challenge on direct appeal the sentencing enhancements under ACCA or the Sentencing Guidelines relating to his prior convictions for carrying a concealed weapon. At the time of his

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brief on direct review, and are assumed to be correct for the purposes of this petition.

[3] In the absence of the statutory and Guidelines enhancements, Hunter's base offense level would have been set at 20 because he committed the offense after having sustained one felony conviction for a controlled substance offense. U.S.S.G. § 2K2.1(a)(4). He would have received an extra two points (to 22) because the firearm had a partially obliterated serial number. *Id.* § 2K2.1(b)(4). Because of his eight criminal history points, his criminal history category would have remained at category IV. *Id.* § 4A1.1. Based upon an offense level of 22 and a criminal history category of IV, Hunter's applicable Guidelines range would have been 63-78 months.

appeal, the established law in the Eleventh Circuit, as set forth in *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996), held that carrying a concealed weapon created a "serious potential risk of physical injury" and thus constituted a predicate offense—a "violent felony"—for purposes of the enhancement provisions of ACCA. *Hall*, 77 F.3d at 401-02.

3. On October 6, 2006, Hunter filed a pro se petition for a writ of habeas corpus, asserting that his two prior convictions for carrying a concealed weapon did not qualify as violent felonies under ACCA or the Sentencing Guidelines. He further alleged that both his trial and appellate counsel rendered ineffective assistance by failing to challenge those enhancements.[4] The district court denied the petition, holding that his challenge to his sentence was foreclosed under *Hall*, *supra*. For similar reasons, it rejected the ineffective assistance claim. App. 10a-11a, 12a-19a.

Thereafter, Hunter moved pro se in the district court for a COA on the question of whether *Hall* remained good law after *Leocal v. Aschroft*, 543 U.S. 1 (2004), which interpreted a statutory sentencing enhancement analogous to the ACCA provision. The district court denied the motion for a COA in a short form order. App. 9a. On December 4, 2007, the Eleventh Circuit summarily denied issuance of a COA in a single-sentence order, stating that Hunter "has failed to make a substantial showing of the denial of a constitutional right." App. 8a. (citing 28 U.S.C. § 2253(c)(2)). The court adhered to that decision upon reconsideration in an almost identical short form order. App. 7a.

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[4] Hunter also claimed a Speedy Trial Act violation that is not relevant to this petition.

On April 23, 2008, Hunter filed a pro se petition for writ of certiorari, asking this Court to determine whether a concealed weapon conviction constituted an ACCA predicate offense. In response, the Solicitor General recommended that the case be GVR'ed for reconsideration in light of *Begay v. United States*, 128 S. Ct. 1581 (2008). As the Solicitor General noted, *Begay* limited the residual provision in the statutory definition of a "violent felony" under ACCA to only those felonies that present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). This Court held that a conviction for driving while under the influence of alcohol or drugs is not a violent felony under the statute. Moreover, by that time, the Eleventh Circuit had already reconsidered in light of *Begay* whether carrying a concealed firearm qualified as a crime of violence under the Sentencing Guidelines, holding that it did not. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). On November 17, 2008, this Court GVR'ed for reconsideration in light of *Begay*. App. 6a.

4. On remand, surprisingly, the Eleventh Circuit did not solicit further briefing from either party. Instead, it summarily denied Hunter's motion for a COA yet again.[5] The Eleventh Circuit acknowledged that "*Begay* provides good reason to conclude that [Hunter] was erroneously sentenced as an armed career criminal," and that its own precedents to the contrary "had been undermined to the point of abrogation." App. 2a. It nevertheless held that a sentencing error alone does not amount to "a

[5] This was actually the *fourth* ruling by the Eleventh Circuit denying the COA for the same reason. *See* App. 1a, 5a, 7a, 8a.

substantial showing of the denial of a constitutional right"—the same reason it gave more than a year earlier when it denied the COA the first time. *Id.* (quoting 28 U.S.C. § 2253(c)). The court relied heavily on cases involving challenges to errors in the application of the Guidelines, which it said were " 'generally not cognizable in a collateral attack.' " *Id.* (quoting *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998)). The court also rejected the ineffective assistance claim, reasoning that because its precedents (since abrogated) had foreclosed Hunter's arguments on direct review, his counsel could not have been ineffective for failing to raise them. *Id.* at 4a.

5. Pending before this Court is another petition for a writ of certiorari to the Eleventh Circuit, *Watts v. United States*, No. 08-7757, which presents the identical issue: whether carrying a concealed weapon is an ACCA predicate offense. Because of the close similarity and precedential relationship between these cases, the disposition of *Watts* will have a significant bearing on the disposition of this matter. In her response to the *Watts* petition, the Solicitor General stated that the denial of the COA was an error *both in* Watts *and in this case.*

Like Hunter, Watts was convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and erroneously sentenced as an armed career criminal to a mandatory minimum term of 15 years based, in part, on the determination that a prior concealed weapon conviction was a predicate felony under ACCA. After the Eleventh Circuit affirmed Watts's sentence in reliance on *Hall*, it affirmed the denial of habeas relief and denied his request for a COA.

In May 2009, the Solicitor General confessed error, asking this Court to GVR the petition in *Watts* with explicit directions to the court of appeals to issue a COA. The government reasoned that the decisions of this Court in *Begay* and the Eleventh Circuit in *Archer* held that a concealed weapon conviction does not qualify as an ACCA predicate offense as a matter of law. Contrary to the Eleventh Circuit's ruling, those precedents provided grounds for a "substantial showing" that Watts's sentence violated due process, entitling him to a COA. According to the government, the erroneous application of ACCA presents an issue of constitutional magnitude, because the resulting sentence both exceeded "the maximum term authorized by law," and "deprive[d] . . . the court [of its] discretion to impose a lower sentence than the maximum." Brief of the United States, dated May 2009 ("U.S. *Watts* Br.") at 8-9 (citing *Whalen v. United States*, 445 U.S. 684, 690 (1980) and *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980)). The government further explained that *Begay* and *Archer* should be given retroactive effect as substantive sentencing rules. *See id.* at 10 (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004); *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)).[6] The government expressly rejected the Eleventh Circuit's reliance on Guidelines cases because those decisions concerned the misapplication of law within a court's sentencing authority, while the ACCA error increased the statutory maximum. *Id.* at 7.

Recognizing that the decision below in *Hunter* presented precisely the same issue, the government

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[6] In any event, the Solicitor General stated that she would not rely on *Teague v. Lane*, 489 U.S. 288 (1989), as a procedural bar to the issuance of a COA in *Watts*. *Id.* at 13.

made clear that the Eleventh Circuit's denial of a COA in this case was equally wrong. "The sentencing errors both [in *Watts*] and in *Hunter* implicate the defendants' due process rights and give rise to a substantial showing of the denial of a constitutional violation." *Id.* at 11.

The Solicitor General concluded her submission in *Watts* with an unusual and expansive request for remedial action. First, she asked the Court to GVR the case with explicit instructions to the court of appeals to issue a COA. *Id.* at 11. She explained that this was necessary because the Eleventh Circuit would otherwise be bound by its incorrect decision in this case. Next, she recommended that the Eleventh Circuit remand the case to the district court to allow reconsideration of the constitutional claim under the change in law effected by *Begay* and *Archer*. As a final step, the Solicitor General suggested that, on remand to the district court, she would not oppose the court's consideration of a claim for collateral relief based upon the statutory ground that the sentence was in "excess of the maximum authorized by law," which would avoid the constitutional issue. *Id.* at 13 (quoting 28 U.S.C. § 2255(a)). *Watts* remains pending before this Court.

## REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's refusal to grant Hunter a COA to allow him to challenge a concededly unlawful and plainly unjust sentence constitutes a clear error of law that warrants review and a summary reversal by this Court.

There is no dispute that Hunter's sentencing to a mandatory 15-year term was erroneous as a matter of law. In the decision below, following this Court's prior order of remand, the Eleventh Circuit acknowledged that it was a legal error to sentence Hunter as an armed career criminal under the recidivist enhancement provision of ACCA. The result of that error was to impose a sentence that exceeds by more than five years the maximum sentence available under a correct application of the law. In addition, the district court was deprived of its discretion to impose a far shorter sentence. Under the most fundamental principles of due process and justice, Hunter's illegal sentence cannot stand. There is simply no legal doctrine or constitutional basis that can justify preserving a sentence that would incarcerate Hunter, depriving him of his liberty, for a term that far exceeds the maximum punishment that is allowed by applicable law.

Accordingly, the error in the Eleventh Circuit's refusal to grant a COA and allow collateral review of Hunter's unauthorized sentence is apparent. The Solicitor General has conceded in *Watts* that the erroneous application of the career criminal enhancement provision in ACCA is a violation of potentially constitutional dimension. She further has conceded that the substantive rulings in *Begay* and *Archer* are retroactively applicable on habeas review. Thus, she

has agreed in these circumstances that there is a "substantial showing of the denial of a constitutional right" required for a COA. Therefore, there can be no dispute that Hunter has met the standard for a COA because, at the least, "reasonable jurists [can] debate" that the denial of Hunter's habeas petition "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

The fundamental liberty interests that are at stake here, as well as the government's unqualified confession of error, justify—indeed require—a remedy that will promptly rectify the errors by the courts below. A summary reversal of the court of appeals' ruling and issuance of a COA is the first and necessary step. The government has proposed further remedial action in the companion case of *Watts* that is equally just and appropriate here. The court of appeals should return the matter to the district court so that Hunter's habeas application may be reconsidered and, ultimately, he may be resentenced de novo.

## I. HUNTER'S ENHANCED SENTENCE UNDER ACCA IS ERRONEOUS AS A MATTER OF LAW AND VIOLATES HIS DUE PROCESS RIGHTS.

In the absence of ACCA, Hunter faced a statutory sentencing range of zero to 10 years' imprisonment for his offense of conviction. But the application of ACCA elevated his statutory sentencing range to a minimum term of 15 years. That interpretation was erroneous as a matter of law. Furthermore, because

the resulting sentence violated due process, Hunter was entitled to a COA on his claim that he should have been sentenced to a lower term.

### A. The Misapplication of ACCA to Enhance Hunter's Sentence Is an Undisputed Error of Law.

In *Begay*, this Court significantly narrowed the class of crimes that would qualify as predicate offenses under the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii). To warrant an enhancement based upon a prior "violent felony" offense—an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another"—the prior offense must be similar in kind, and in degree of risk posed, to the examples of burglary, arson, extortion, and offenses involving the use of explosives enumerated in the statute. 128 S. Ct. at 1584-85. Because ACCA is concerned with punishing offenders who create a special risk of public harm by virtue of their prior criminal history, qualifying predicate offenses "typically involve purposeful, violent, and aggressive conduct." *Id.* at 1587 (internal quotation marks omitted). Viewing ACCA in light of this purpose, this Court in *Begay* held that the crime of driving while under the influence of alcohol or drugs did not constitute a "violent felony" within the meaning of the statute, because it differed from the category of intentional offenses typically associated with a likelihood of future violent conduct.

Since *Begay*, the circuits that have addressed the issue in the firearm context have unanimously held that a weapon possession offense does not qualify as a violent felony under ACCA because it consti-

tutes a passive act that does not, without more, involve purposeful, violent, or aggressive conduct. *See, e.g.*, *United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009) (possession of an unregistered weapon is not a violent felony under ACCA); *United States v. Haste*, 292 F. App'x 249 (4th Cir. 2008) (possession of a weapon of mass destruction is not a violent felony under ACCA); *see also United States v. Flores*, 477 F.3d 431 (6th Cir. 2007) (before *Begay*, ruling that carrying a concealed weapon is not a violent felony under ACCA); *United States v. Whitfield*, 907 F.2d 798 (8th Cir. 1990) (same). The Solicitor General has agreed, explaining that under the standard articulated by this Court in *Begay*, carrying a concealed weapon is not a qualifying offense under ACCA. U.S. *Watts* Br. at 10.

The Eleventh Circuit itself now concedes that its pre-*Begay* precedents were wrong. In *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), the court already acknowledged that carrying a concealed weapon cannot be considered a "crime of violence" under the career offender enhancement of the Sentencing Guidelines, and that therefore its prior holdings to the contrary (in the context of the Guidelines and ACCA) have been "undermined to the point of abrogation." *Id.* at 1352. In the decision below, the court conceded there was "good reason to conclude that Hunter was erroneously sentenced as an armed career criminal." App. 2a. Now, in the few months since that decision, the Eleventh Circuit has flatly held that carrying a concealed weapon is not an ACCA predicate. *See Townsley*, 2009 WL 929986, at *3 (vacating enhanced sentence where prior concealed weapon offense was counted as a violent felony); *United States v. Redeemer*, No. 07-15837,

2009 WL 684749, at *1 (11th Cir. Mar. 17, 2009) (unpublished) (same).

Accordingly, this is a case in which all legal authorities—including the very court whose decision is under review—agree that the statutory basis for the imposed sentence is wrong. And yet, the Eleventh Circuit refused to allow Hunter even to argue that he should be resentenced in accordance with the law.

### B. The Erroneous Application of ACCA Violated Hunter's Due Process Rights.

The Eleventh Circuit erred when it held that the admittedly improper application of ACCA's sentencing enhancement did not violate Hunter's due process rights. As the Solicitor General has demonstrated, this Court's precedents hold that sentencing a defendant to a term of imprisonment based upon a statute that indisputably does not apply to him violates basic principles of due process. U.S. *Watts* Br. at 8-11.

In *Whalen v. United States*, 445 U.S. 684 (1980), this Court articulated the fundamental rule that a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress."[7] 445 U.S. at

[7] In *Whalen*, the defendant was erroneously sentenced to consecutive prison terms for murder and rape, the latter of which should have been merged into the former for sentencing purposes. *Id.* at 686-87 The Court reversed the defendant's sentence because of the "guarantee against double jeopardy, [and] also the constitutional principle of separation of powers," *id.* at 689, noting that although states are not bound by the doctrine of separation of powers, "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts

690. Within the federal constitutional framework, "the legislative power, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Id.* at 689. Where a court exceeds its sentencing authority by imposing punishment more severe than Congress contemplated, it "trenches particularly harshly on individual liberty." *Id.* Accordingly, no criminal defendant can be subject to a penalty of imprisonment in the absence of a clear legislative mandate authorizing such a penalty.

This Court set forth a related principle in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), which held that a habitual offender is denied due process when the sentencer is erroneously prevented from exercising its statutory discretion to impose a lesser sentence. *Id.* at 346-47. The defendant in *Hicks* was sentenced to a 40-year mandatory minimum prison term under a state habitual offender statute that was declared unconstitutional subsequent to his conviction. *Id.* at 344-45. The state appellate court affirmed, reasoning that because the sentence was within the range of punishment available, the jury might have exercised its discretion to impose the same sentence. *Id.* at 345. Reversing, this Court observed that a defendant has a substantial and legitimate expectation that he will be sentenced within a legal framework that properly defines the upper and lower limits of the district court's discretion. *Id.* at 346. Recognizing the fundamental unfairness of a sentence that is fashioned based upon the district court's misapprehension of its own sentencing authority, this

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from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* at 689 n.4.

Court held that the defendant in *Hicks* was denied his right to "be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.*

A number of circuits have followed the lessons in these cases and held that sentences imposed inconsistently with the law violate due process. The Tenth Circuit, citing *Whalen* and *Hicks*, held that when a defendant "receive[s] a sentence patently in excess of the maximum permitted[, t]his claim implicates due process concerns" and requires a resentencing in which the improper enhancement is not considered. *Richardson v. Evans*, 99 F.3d 1150, 1996 WL 603278, at *4 (10th Cir. 1996) (unpublished).[8] The Ninth Circuit followed *Hicks* and *Whalen* in reversing a sentence erroneously altered by the state Department of Corrections under the wrong California statute, stating that because the defendant had "a liberty interest in the correct sentence of eight months, it was a due process violation to order him to a full two-year term." *Wasko v. Vasquez*, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987). Other courts have held the same in analogous contexts. *See United States v. Eakman*, 378 F.3d 294, 296-97 (3d Cir. 2004) (granting defendant's motion for habeas relief

[8] In *Richardson*, the defendant challenged his sentencing enhancement under Oklahoma's subsequent offender statute, where the prior conviction that provided the basis for his enhancement was a nonqualifying misdemeanor under Oklahoma law, but a qualifying felony under Texas law. 1996 WL 603278, at *3. The Tenth Circuit remanded the case for resentencing upon defendant's 28 U.S.C. § 2254 petition, stating that "[t]he Due Process Clause of the Fourteenth Amendment prohibits state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* at *4.

because the sentencing court violated his due process rights by relying upon its own misunderstanding of the Bureau of Prisons' authority to assign a prisoner to a community corrections center, and thus denied him the ability to argue for a downward departure); *Jones v. Arkansas*, 929 F.2d 375, 377-78 (8th Cir. 1991) (reversing defendant's erroneous sentence under the Arkansas habitual offender statute and holding that he was "denied due process because he was sentenced under a statute that was not in effect at the time he committed his crime").[9]

Imposing punishment inconsistent with what the law authorizes raises distinct constitutional concerns in a variety of other contexts. For instance, this Court has held that a convicted felon's involuntary commitment violates due process when it occurs without evidence that he is mentally ill. *Vitek v. Jones*, 445 U.S. 480 (1980). This is because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and a defendant has the constitutional right to be punished in a way that is reasonably related to the pur-

[9] Similarly, the circuits have adhered to this Court's teaching in *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), that a sentence violates due process when it is premised upon erroneous facts. *See, e.g., King v. Hoke*, 825 F.2d 720, 724-25 (2d Cir. 1987) (observing that "it is well-established that '[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process' ") (citation omitted); *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986) (noting that a defendant may be entitled to assert a challenge to his sentence under 28 U.S.C. § 2255 if "the district court relied on false information in sentencing him, [because] he may have been denied due process of law").

pose of his punishment. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Jones v. United States*, 463 U.S. 354, 361 (1983). This Court has extended due process protections to similar types of governmental actions that restrict a defendant's liberty beyond what the law allows, including decisions that improperly revoke parole, *see Morrissey v. Brewer*, 408 U.S. 471 (1972), revoke probation, *see Gagnon v. Scarpelli*, 411 U.S. 778 (1973), eliminate good-time credits, or impose solitary confinement, *see Wolff v. McDonnell*, 418 U.S. 539 (1974).[10]

The Eleventh Circuit ignored these fundamental principles when it held that the acknowledged sentencing error here is of the type "generally not cognizable in a collateral attack." App. 4a. In doing so, it relied upon cases stating that errors in the application of the Sentencing Guidelines are generally not subject to collateral attack. *Id.* (citing *United States v. Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000); *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998); *United States v. Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994)). These decisions, however, are inap-

[10] In a parallel context, this Court has prohibited imposing "grossly excessive" punishment upon tortfeasors, recognizing that due process creates substantive limits beyond which certain penalties may not go. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-55 (1993). Thus, a court may not award punitive damages in a way that amounts to changing the nature of the conduct for which the tortfeasors were found responsible and deprives them of property without due process. *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996). Similarly, this Court has applied due process protections to punitive forfeitures of property when they are not authorized by law. *See Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-90 (1974); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

posite. As the government observed in *Watts*, the authorities cited by the Eleventh Circuit involved technical misapplications of the Sentencing Guidelines and concerned sentences that were within the court's authority and discretion to impose. U.S. *Watts* Br. at 7. By contrast, the excessive sentences under ACCA at issue in *Watts* and here were beyond the court's authority and discretion to impose. Accordingly, the Eleventh Circuit's improper application of ACCA to Hunter's sentence violated his due process rights.

### C. Hunter Has Established Grounds for a Certificate of Appealability.

As demonstrated above, Hunter's sentence in excess of the maximum term authorized by law violates due process. In order to qualify for a COA, however, Hunter is required to make only a "*substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). The test is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483-84 (internal quotation marks omitted). Recognizing the strength of the precedents on Hunter's side, the Solicitor General conceded in *Watts* that Hunter has "at least" done that. U.S. *Watts* Br. at 8, 10. Accordingly, Hunter should have been granted a COA.[11]

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[11] The government indicated in *Watts* that it would not rely upon the procedural bar in *Teague v. Lane*, 489 U.S. 288 (1989), which precludes the application of intervening precedent on collateral review in certain cases. U.S *Watts* Br. at 13 n.6 (citing *Danforth v. Minnesota*, 128 S. Ct. 1029, 1046 (2008)). Presum-

## II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

The most appropriate and expeditious disposition of this case would be for this Court to grant the writ and summarily reverse the Eleventh Circuit's decision. This case, in fact, presents the classic situation warranting a summary reversal, which has been described as the "kind of reversal order [that] usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman et al., *Supreme Court Practice* 344-45 (9th ed. 2007) (also noting that summary reversal is appropriate when federal respondents have confessed error).[12] The Eleventh Circuit's decision that Hunter could not make a substantial showing of a constitutional violation was manifestly wrong, as the Solicitor General has conceded in *Watts*. Moreover, it is a decision to which the Eleventh Circuit has

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ably, it will take the same position here as a matter of equity. In any event, as the government concedes, *Teague* would not apply because the decisions in *Begay* and *Archer* constitute substantive holdings concerning eligibility for a recidivist enhancement that are entitled to retroactive effect on collateral review. *Id.* at 10 & 13 n.6. *See Schriro*, 542 U.S. at 353 ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes"); *Bousley*, 523 U.S. at 620-21 ("decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct" are retroactive on collateral review).

[12] *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (explaining that summary reversal was appropriate because the case did not "decide any new or unanswered question of law, but simply correct[ed] a lower court's demonstrably erroneous application of federal law").

incorrectly adhered in four separate rulings—both before this Court's GVR and after.[13]

The Solicitor General has indicated that after remand in *Watts*, she would ask the Eleventh Circuit to remand the matter to the district court for consideration of the due process claim in light of *Begay* and the Eleventh Circuit's decision in *Archer*. She further has submitted that, on remand, habeas relief may be available under the non-constitutional ground in § 2255(a) authorizing relief from a sentence "in excess of the maximum authorized by law." *See* U.S. *Watts* Br. at 13; *see also Mateo v. United States*, 310 F.3d 39 (1st Cir. 2002) (*Mateo I*), and *Mateo v. United States*, 276 F. Supp. 2d 186 (D. Mass. 2003) (*Mateo II*), *aff'd*, F.3d 126 (1st Cir. 2005) (holding that if, on a "quick look," a habeas petitioner's constitutional claim is not completely without merit, the appellate court should grant the COA and remand, whereupon the district court should consider both constitutional and non-constitutional arguments for habeas relief). Indeed, the Solicitor General has stated that she would not oppose such reconsideration "on the facts of this case." That same course of action should be followed here, allowing Hunter to obtain habeas relief from his equally excessive sentence.

[13] As an alternative to summary reversal, Hunter's petition could be granted and the case set for plenary review.

## CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

July 24, 2009

Respectfully submitted,

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# APPENDIX

# OPINION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON REMAND DENYING CERTIFICATE OF APPEALABILITY, NO. 07-13701-J (11TH CIR.), DATED FEB. 24, 2009

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Caption Omitted

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Before TJOFLAT, PRYOR and ANDERSON, Circuit Judges.

This appeal presents the issue whether a criminal defendant who was erroneously sentenced has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Demarick Hunter is a federal prisoner serving a sentence of imprisonment of 188 months for being a felon in possession of a firearm, 18 U.S.C. § 924(g). He moved to vacate his sentence, 28 U.S.C. § 2255, and the district court denied his motion. Hunter then sought a certificate of appealability from this Court, and we denied the application. The Supreme Court vacated our order denying the certificate of appealability and remanded for reconsideration in the light of its decision in *Begay v. United States*, 553 U.S. ___, 128 S. Ct. 1581 (2008), which held that driving under the influence was not a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Because Hunter has failed to make "a substantial showing of the denial of a constitutional right," we deny his motion for a certificate of appealability.

Hunter requests a certificate of appealability for two issues that are relevant to the decision of the Supreme Court in *Begay*. First, Hunter contends that his due process rights were violated when he was sentenced as an armed career criminal based on two prior convictions for carrying a concealed weapon. Second, Hunter argues that his appellate counsel was ineffective for failing to object to the use of his prior firearms convictions in determining that he was subject to an armed career criminal enhancement. Neither argument involves a substantial showing of the denial of a constitutional right.

Before the decision of the Supreme Court in *Begay*, we held that carrying a concealed weapon was a violent felony under the Armed Career Criminal Act, *United States v. Hall*, 77 F.3d 398, 401 (11th Cir. 1996), and was a "crime of violence" under the Sentencing Guidelines, *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir. 1998). After *Begay*, a panel of this Court determined that these prior panel precedents had been undermined to the point of abrogation by the decision of the Supreme Court. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). This Court also stated, in dicta, that carrying a concealed weapon is not a violent felony under the Armed Career Criminal Act. *Id.*

Although *Begay* provides good reason to conclude that Hunter was erroneously sentenced as an armed career criminal, a sentencing error alone does not amount to "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Before Congress enacted the Antiterrorism and Effective Death Penalty Act, *id.*, the decision of the Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct.

3383 (1983), provided the standard for granting a certificate of probable cause, which required a petitioner to make a "substantial showing of the denial of a federal right." *Id.* at 893, 103 S. Ct at 3394 (internal quotation marks omitted). The Antiterrorism and Effective Death Penalty Act substituted the narrower term "constitutional" for the term "federal":

> Under AEDPA, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Except for substituting the word "constitutional" for the word "federal," § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle.* Congress had before it the meaning *Barefoot* had given to the words it selected; and we give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word "constitutional."

*Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603 (2000) (citation omitted). "The term 'constitutional right' means something very different from the term 'federal right,' and because we must assume Congress 'means in a statute what it says,' *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 1149-50 (1992), we give effect to the change." *United States v. Cepero*, 224 F.3d 263, 264 (3d Cir. 2000) (en banc). We may issue a certificate of appealability only where a petitioner makes "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c) (emphasis added).

Although Hunter presents his arguments for a certificate of appealability as involving a denial of due process and ineffective assistance of counsel, Hunter's sentencing error did not give rise to a violation of the Constitution. Hunter was afforded due process at his sentencing hearing, and sentencing errors "are generally not cognizable in a collateral attack." *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998); *see also Cepero*, 224 F.3d at 267-68; *United States v. Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994). To prevail on a claim of ineffective assistance of counsel, Hunter must prove that " 'no competent counsel would have taken the action that his counsel did take.' " *Ford v. Hall*, 546 F.3d 1326, 1333 (11th Cir. 2008) (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc)). Hunter cannot satisfy that burden because, when his original sentence and direct appeal occurred, our precedent, *Hall*, 77 F.3d 398, foreclosed the argument that carrying a concealed weapon was not a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Hunter's application for a certificate of appealability is **DENIED.**

# ORDER OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON REMAND DENYING CERTIFICATE OF APPEALABILITY, NO. 07-13701-J (11TH CIR.), DATED FEB. 4, 2009

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Caption Omitted

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Before PRYOR and ANDERSON, Circuit Judges.

BY THE COURT:

This appeal is on remand from the Supreme Court of the United States, which vacated our earlier judgment denying a certificate of appealability and remanded for reconsideration in the light of *Begay v. United States*, 128 S.Ct. 1581 (2008). Upon reconsideration, Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

# ORDER OF THE SUPREME COURT GRANTING PETITION FOR WRIT OF CERTIORARI, VACATING, AND REMANDING, NO. 07-11550 (S. CT.), DATED NOV. 17, 2008

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Caption Omitted

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JUDGES: Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito.

OPINION

On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Begay v. United States*, 553 U.S. ___, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008).

## ORDER OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR RECONSIDERATION, NO. 07-13701-J (11TH CIR.), DATED JAN. 24, 2008

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Caption Omitted

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Before ANDERSON and PRYOR, Circuit Judges.

BY THE COURT

Appellant has filed a motion for reconsideration of this Court's order dated December 4, 2007. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *United States v. Hall*, 77 F.3d 398, 401 (11th Cir. 1996).

# ORDER OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY, NO. 07-13701-J (11TH CIR.), DATED DEC. 4, 2007

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Caption Omitted

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Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

By: /s/ WILLIAM H. PRYOR, JR.
UNITED STATES CIRCUIT JUDGE

# ORDER OF THE DISTRICT COURT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY, NO. 06-22555-CIV-UUB (S.D. FLA.), DATED AUG. 6, 2007

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Caption Omitted

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THIS CAUSE is before the Court upon Movant's Motion for Certificate of Appealability. DE 18. The Court, having considered the Motion and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Movant's Motion (DE 18) is DENIED. Movant has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of August, 2007.

Signature Omitted

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies Omitted

# ORDER OF THE DISTRICT COURT AFFIRMING REPORT OF MAGISTRATE JUDGE, NO. 06-22555-CIV-UUB (S.D. FLA.), DATED APRIL 16, 2007

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Caption Omitted

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THIS CAUSE is before the Court on Movant's Motion under 28 U.S.C. § 2255. DE 1. The matter was referred to Magistrate Judge White, who on March 20, 2007, issued a Report (DE 10) recommending that the Motion be denied. *See* DE 10 (Report) at 7. The parties have not objected to the Report.[1]

Accordingly, having conducted a *de novo* review of the record and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Magistrate Judge's Report (DE 10) is RATIFIED, AFFIRMED AND ADOPTED. It is further

ORDERED AND ADJUDGED that Movant's Motion under 28 U.S.C. § 2255 (DE 1) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of April, 2007.

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[1] The Court has considered Movant's Motion (DE 12) seeking reconsideration of the Report in light of Movant's "Traverse" (DE 11). However, Movant's arguments do not affect the analyses upon which the Report is based. *Compare* DE 10 (Report), *with* DE 11 (Traverse).

Signature Omitted

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

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# REPORT OF MAGISTRATE JUDGE ON MOTION UNDER 28 U.S.C. § 2255, NO. 06-22555-CIV-UUB (S.D. FLA.), DATED MARCH 20, 2007

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Hunter Demarick, a federal prisoner currently confined at the Federal Correctional Camp in Coleman, Florida, filed a *pro se* motion to vacate pursuant to 28 U.S.C. § 2255, attacking his conviction and sentence imposed upon a jury verdict of guilty entered in Case No. 03-20712-Cr-Ungaro-Benages.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

For its consideration of the motion and memorandum in support thereof and the movant's emergency motion for leave to amend, the Court has the government's response to an order to show cause and the underlying criminal file.

Demarick raises five claims as follow:

1. His sentence was imposed in violation of the Fifth Amendment because he was sentenced as an armed career criminal based upon two State convictions for carrying a concealed weapon.

2. He received ineffective assistance of counsel when counsel failed to challenge the use of his prior convictions for carrying a concealed firearm to determine his status as an

armed career criminal and when counsel failed to pursue his right to a speedy trial under the Speedy Trial Act.

3. His conviction was obtained in violation of the Speedy Trial Act.

4. He received ineffective assistance of appellate counsel when counsel failed to challenge his sentence which was imposed upon a finding that he is an armed career and failed to challenge his conviction based upon a violation of the Speedy Trial Act.

5. He received ineffective assistance of appellate counsel when counsel failed to challenge his sentence based upon the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where the Supreme Court found that driving while intoxicated resulting in serious bodily injury did not constitute a crime a violence for purposes of whether the commission of an aggravated felony warrants deportation under the Immigration and Naturalization Act.

Demarick was charged by indictment with being a convicted felon in possession of a firearm in and affecting commerce. (Cr. DE# 7). He proceeded to trial by jury and was found guilty as charged. (Cr. DE# 81). The Court sentenced him to 188 months imprisonment, followed by five years of supervised release. (Cr. DE# 89). His conviction and sentence were affirmed, and this timely motion to vacate ensued.

Demarick challenges his conviction and sentence, arguing both substantive error and ineffective assistance of trial and appellate counsel for failing to raise those claims. In order to prevail on a claim of ineffective assistance of counsel, Demarick must establish that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, Demarick must show that his counsel's performance was below constitutional standards and that he suffered prejudice as a result. A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. *Id.* at 697; *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995).

The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). There is no duty to raise issues on appeal which have little or no chance of success. Thus, appellate counsel is not required to raise meritless issues, *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990), or issues which were not preserved and are procedurally barred on appeal, *Bertolotti v. Dugger*, 883 F.2d 1503, 1523 (11th Cir. 1989), *cert. denied*, 497 U.S. 1032 (1990); *Jackson v. Dugger*, 931 F.2d 712, 715 (11th Cir. 1991).

Demarick argues in his first claim that his sentence was imposed in violation of the Fifth Amendment because he was sentenced as an armed career offender based upon two prior convictions for car-

rying a concealed firearm, which should not have been counted as crimes of violence necessary for satisfying the armed career offender requirement. He argues in his second claim that trial counsel was ineffective for failing to challenge the use of the convictions at sentencing and that appellate counsel was ineffective for failing to raise the claim on appeal.

His argument is contrary to Eleventh Circuit precedent. In *United States v. Hall, et al.*, 77 F.3d 398 (11th Cir. 1996), the Eleventh Circuit rejected the same claim raised by defendant McKinney. McKinney was convicted of being a felon in possession of a firearm and classified as an armed career criminal at sentencing, based in part upon his prior conviction for carrying a concealed firearm. Like Demarick, McKinney relied upon *United States v. Oliver*, 20 F.3d 415 (11th Cir. 1994) to support his argument that carrying a concealed firearm was not violent felony because the Court had concluded in *Oliver* that possession of a firearm by a convicted felon was not a violent felony. The Eleventh Circuit rejected the argument because the conduct poses serious potential risk of physical injury based upon the act of readiness or immediate accessibility for use on another. Thus, the Court concluded that such an offense falls under the definition of violent felony. It expressly held that the district court did not err in using the prior conviction for carrying a concealed weapon to enhance the sentence under the Armed Career Criminal Act.

Likewise, the Court did not err in sentencing Demarick as an armed career criminal based upon his prior convictions for carrying a concealed

weapon. Neither trial nor appellate counsel were ineffective for failing to raise the nonmeritorious claim at sentencing or on appeal.

In his third claim, Demarick argues that his conviction was obtained in violation of the Speedy Trial Act. He argues in his second claim that trial counsel was ineffective for failing to raise the claim at trial and in his fourth claim he argues that appellate counsel was ineffective for failing to raise the claim on appeal.

The Speedy Trial Act, codified at 18 U.S.C. § 3161, requires that the trial of any indicted defendant commence within seventy days from the latter of either the filing date of the indictment or the date on which the defendant first appears before the court in which that case was pending. 18 U.S.C. § 3161(c)(l). In cases involving multiple defendants, the seventy-day time limit begins to run when the last codefendant is indicted or arraigned. 18 U.S.C. § 3151(h)(7); *See also Henderson v. United States*, 476 U.S. 321, 323, n.2 (1986).

Certain periods of delay are excludable from the calculation of the seventy-day limit. 18 U.S.C. § 3161(h). Delay resulting from the filing of a pretrial motion through the disposition of such a motion or delay resulting from the unavailability of the defendant or an essential witness is excludable time under the Speedy Trial Act. 18 U.S.C. § 3161(h)(1)(F) and (h)(3)(A). Periods of delay resulting from a requested continuance where the court finds that the ends of justice outweigh the best interest of the public and the defendant in a speedy trial are also excludable. 18 U.S.C. § 3161(h)(8)(A). Any excludable delay attributable to one defendant

tolls the speedy trial clock for all codefendants. *See United States v. Twitty*, 107 F.3d at 1488, *United States v. Schlei*, 122 F.3d 944, 985 n.15 (11th Cir. 1997); *United States v. Varella*, 692 F.2d, 1352, 1359 (11th Cir. 1982), *cert. denied*, 464 U.S. 838 (1983).

Demarick's first appearance was August 19, 2003. The 70-day speedy trial period expired on October 28, 2003. On October 27, 2003, Demarick, through counsel, filed a motion to suppress evidence. (Cr. DE# 22). An evidentiary hearing was held on the motion and a report and recommendation was entered on December 31, 2003. Demarick's attorney subsequently filed a motion to continue trial and to extend the time for filing objections to the report on the motion to suppress. (Cr. DE# 48). The motion was granted, and objections were filed on January 16, 2004. (Cr. DE#s 51 and 52). The government's response was filed on January 22, 2004. (Cr. DE# 53). On January 23 and 27, 2004, sealed documents were filed, including an *ex parte* motion to withdraw as counsel. (Cr. DE#s 54, 55, 56 and 59). A continuance was granted and new counsel was appointed. (Cr. DE# 58, 61, 62, and 64). The motion to suppress was denied on May 4, 2004. (Cr. DE# 71). In the meantime, Demarick filed a motion to order a government witness to appear for a psychiatric evaluation. (Cr. DE# 67). The government filed a response and was subsequently ordered to file a more definite response regarding whether or not the witness would be called at trial. (Cr. DE#s 70 and 72). A response to the order was filed on May 10, 2004. Trial of this matter commenced on June 7, 2004. During the course of pretrial proceedings, calendar calls were regularly held, and based upon the rep-

resentations of counsel at the calendar call and alternately the representations of counsel in the various motions for continuance, trial was continued with the proviso that the continuances were in the interest of justice and that time was excludable under the Speedy Trial Act. Demarick has not shown that the excluded time periods were in violation of the Speedy Trial Act.

The Court did not violate the Speedy Trial Act, and neither trial nor defense counsel were ineffective for failing to raise the claim. Demarick is not entitled to relief on his second third or fourth claims.

In his fifth claim, Demarick argues that he received ineffective assistance of appellate counsel when counsel failed to challenge his sentence based upon the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The Supreme Court held that driving while intoxicated resulting in serious bodily injury did not constitute a crime a violence for purposes of whether the commission of an aggravated felony warrants deportation under the Immigration and Naturalization Act. *Id.* There was no reason for appellate counsel to make such an argument, as the facts are totally distinguishable from those in Demarick's case. Demarick is not entitled to relief on his fifth claim.

It is therefore recommended that the motion to vacate be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Signed in chambers at Miami, Florida, this 20th day of March, 2007.

Signature Omitted

Copies Omitted

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

No. 09-122

# In the Supreme Court of the United States

DEMARICK HUNTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether petitioner has made a "substantial showing of the denial of a constitutional right," thus justifying the issuance of a certificate of appealability under 28 U.S.C. 2253(c), when, under decisions of this Court construing the Armed Career Criminal Act, petitioner's term of imprisonment exceeds the maximum term authorized for his offense as a matter of law.

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# In the Supreme Court of the United States

No. 09-122

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 559 F.3d 1188.

### JURISDICTION

The judgment of the court of appeals was entered on February 24, 2009. On May 6, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 24, 2009. On June 12, 2009, Justice Thomas further extended the time to July 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 188 months of imprisonment, five years of supervised release, a $3000 fine, and a special assessment of $100. Gov't C.A. Br. at 1, *United States* v. *Demarick*, 140 Fed. Appx. 163 (11th Cir. 2005) (No. 04-15136). On direct appeal, the court of appeals affirmed. Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255.[1] The district court denied that motion as well as petitioner's motion for a certificate of appealability (COA). The court of appeals also denied petitioner's motion for a COA and for reconsideration of that decision. Petitioner then petitioned for a writ of certiorari. The government agreed that further consideration was warranted in light of *Begay* v. *United States*, 128 S. Ct. 1581 (2008), and this Court granted the petition, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of *Begay*. On remand, the court of appeals again declined to issue a COA. Pet. App. 1a-4a.

1. On August 15, 2003, a Florida police officer stopped a car in which petitioner, a convicted felon, was a passenger. During the stop, the officer found a pistol and a holster inside the car. The driver later testified

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[1] The Court Security Improvement Act of 2008, Pub. L. No. 110-177, § 511, 121 Stat. 2545, made a technical amendment to 28 U.S.C. 2255, designating the eight undesignated paragraphs as Subsections (a) through (h), respectively. Except where noted, all citations in this brief to 28 U.S.C. 2255 refer to the current version as it will be codified in the 2008 Supplement to the United States Code.

that the gun and the holster belonged to petitioner. Gov't C.A. Br. at 1-4, *Demarick*, *supra* (No. 04-15136). Petitioner was charged in the Southern District of Florida with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), and convicted after a jury trial. *Ibid.*

2. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment if the defendant has violated 18 U.S.C. 922(g)(1) and has at least three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). "[V]iolent felony" is defined as, *inter alia*, an offense that "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(b)(ii). If the ACCA does not apply, the maximum penalty for a Section 922(g) offense is ten years of imprisonment, and there is no mandatory minimum sentence. See 18 U.S.C. 924(a)(2).

Before petitioner was sentenced, the probation office prepared a Presentence Investigation Report (PSR) indicating that petitioner was subject to the mandatory 15-year minimum sentence under the ACCA because he had three prior convictions for "violent felon[ies]" or "serious drug offense[s]." In particular, the PSR included as "violent felon[ies]" petitioner's two convictions for carrying a concealed firearm in 1996 and 1999. The district court adopted the PSR's findings and recommendations and sentenced petitioner to 188 months of imprisonment. Gov't C.A. Br. at 1, 4-5, *Demarick*, *supra* (No. 04-15136).

On direct appeal, petitioner argued that the district court erred in imposing a mandatory Guidelines sentence under *United States* v. *Booker*, 543 U.S. 220 (2005). Petitioner did not challenge the district court's conclusion that his prior convictions for carrying a con-

cealed firearm qualified as "violent felon[ies]" under the ACCA, a claim that at that time was squarely foreclosed by circuit precedent. See *United States* v. *Hall*, 77 F.3d 398, 401 (11th Cir.) ("Carrying a concealed weapon is conduct that poses serious potential risk of physical injury and, so, falls under the definition of violent felony."), cert. denied, 519 U.S. 849 (1996). The court of appeals affirmed petitioner's conviction and sentence. *United States* v. *Demarick*, 140 Fed. Appx. 163 (11th Cir. 2005) (per curiam).

3. On October 6, 2006, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence. Pet. App. 12a; Pet. 6. He alleged, *inter alia*, that the court violated his Fifth Amendment due process rights when it sentenced him under the ACCA because a conviction for carrying a concealed firearm does not qualify as a "violent felony." Petitioner also asserted that his trial and appellate counsel were ineffective in not challenging the use of his concealed-firearm convictions as predicates for application of the ACCA. The motion was referred to a magistrate judge, who recommended that it be denied on the ground that petitioner's arguments were foreclosed by *Hall*, *supra*. Pet. App. 12a-19a. On April 16, 2007, the district court adopted the magistrate judge's report and denied petitioner's Section 2255 motion. *Id.* at 10a-11a. By separate order dated August 6, 2007, the district court denied petitioner's motion for a COA. *Id.* at 9a.

4. Petitioner moved for a COA in the court of appeals, renewing his contentions that the district court committed constitutional error in sentencing him under the ACCA and that his counsel rendered ineffective assistance in failing to challenge the enhancement. Mot. for COA 4. On December 4, 2007, the court of appeals

denied petitioner's request for a COA. Pet. App. 8a. On reconsideration, the court again denied the motion, citing *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Hall*, *supra*. Pet. App. 7a.

5. On April 16, 2008, this Court decided *Begay* v. *United States*, 128 S. Ct. 1581 (2008), holding that a conviction for driving while under the influence of alcohol or drugs is not a "violent felony" under the ACCA's "serious potential risk of physical injury to another" prong. *Id.* at 1588. The court interpreted that language to encompass only offenses involving conduct that is "purposeful, violent, and aggressive." *Ibid.* One week later, on April 23, 2008, petitioner filed a petition for a writ of certiorari, contending that his two concealed-firearm convictions are not "violent felonies" under the ACCA.

In response, the government agreed that the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of *Begay*. The government observed that on April 28, 2008, this Court had vacated and remanded for reconsideration in light of *Begay* the Eleventh Circuit's judgment in *United States* v. *Archer*, 243 Fed. Appx. 564 (2007) (per curiam), vacated, 128 S. Ct. 2051 (2008). U.S. Br. at 5-6, *Hunter* v. *United States*, 129 S. Ct. 594 (2008) (No. 07-11550). That case addressed the related question whether a conviction for carrying a concealed firearm constitutes a "crime of violence" under the career offender guideline, Sentencing Guidelines § 4B1.2, which, like the ACCA, defines a qualifying crime for relevant purposes as an offense that "presents a serious potential risk of physical injury to another." See *ibid.* The government noted that, on remand, the Eleventh Circuit held that carrying a concealed firearm does not satisfy that definition. *United States* v. *Archer*,

531 F.3d 1347, 1352 (2008).[2] The government further observed that even though petitioner's claim arose on collateral attack rather than on direct appeal, the intervening decisions in *Begay* and in *Archer* counseled in favor of allowing the Eleventh Circuit to decide whether to issue a COA in this case. U.S. Br. at 5-6, *Hunter*, *supra* (No. 07-11550).

6. On November 17, 2008, this Court granted the petition, vacated the Eleventh Circuit's judgment, and remanded the case to the court of appeals for further consideration in light of *Begay*. Pet. App. 6a.

7. On remand, without requesting the views of the government, the court of appeals again declined to issue a COA. Pet. App. 1a-4a. The court first observed that under 28 U.S.C. 2253(c)(2), a COA may issue only upon a "substantial showing of the denial of a constitutional right." Pet. App. 1a. The court recognized that, in *Archer*, it had "stated, in dicta, that carrying a concealed weapon is not a violent felony under the [ACCA]," and the court therefore acknowledged that there was "good reason to conclude that [petitioner] was erroneously sentenced" to five years of imprisonment in excess of the otherwise applicable ten-year statutory maximum. *Id.* at 2a. But the court reasoned that petitioner had alleged only "sentencing error," which is "generally not cognizable in a collateral attack," and had not made a "substantial showing of the denial of a *constitutional* right." *Id.* at 2a-4a (emphasis added; citation omitted). The court also reasoned that petitioner could not show ineffective assistance because at the time of his sentencing *Hall* "foreclosed the argument that carrying a concealed

[2] Recently, the Eleventh Circuit squarely held that carrying a concealed weapon is not a "violent felony" under the ACCA. *United States* v. *Canty*, 570 F.3d 1251, 1255 (2009).

weapon was not a violent felony under the" ACCA. *Id.* at 4a. Concluding that "[petitioner] has failed to make 'a substantial showing of the denial of a constitutional right,'" the court denied petitioner's motion for a COA. *Id.* at 1a.

## DISCUSSION

Petitioner contends that the court of appeals erred in denying him a COA under 28 U.S.C. 2253(c). The government agrees with that contention. In light of an intervening decision of this Court construing the ACCA, petitioner is under a sentence of imprisonment that exceeds the maximum term authorized for his offense, and he was deprived of the court's statutory discretion to impose a sentence lower than the correctly understood maximum. For the reasons set forth in the government's response to the petition for a writ of certiorari in *Watts* v. *United States*, petition for cert. pending (No. 08-7757) (filed Feb. 13, 2008), petitioner can therefore make a substantial showing of a due process violation. U.S. Br. at 8, *Watts*, *supra* (No. 08-7757). This Court should grant the petition, vacate the judgment below, and remand this case for further proceedings in light of the government's position.[3]

[3] In *Watts*, *supra*, the government suggested that this Court not only grant the petition and vacate the court of appeals' judgment but also remand with instructions for the court of appeals to issue a COA. U.S. Br. at 11, 14, *Watts*, *supra* (No. 08-7757). The government sought that disposition because, unless this Court directed the issuance of a COA, "the Eleventh Circuit on remand would otherwise be bound by" its decision in this case, which had held that "a sentencing error alone does not" satisfy Section 2253(c). *Id.* at 11 (quoting *Hunter* v. *United States*, 559 F.3d 1188, 1190 (11th Cir. 2009)). If this Court now grants the petition in this case and vacates the decision below, the Eleventh Circuit will be free to reconsider as a *de novo* matter whether to grant a COA, as petitioner and the government contend is appropriate. The

Amici Criminal Law and Habeas Corpus Scholars (Amici) contest that conclusion, arguing on a number of grounds that the court of appeals correctly denied a COA and that this Court should deny the petition for a writ of certiorari. Br. 2-27. Amici's contentions are not persuasive.

1. Amici first contend (Br. 5-6) that petitioner is not entitled to a COA because he does not present the type of claim encompassed by the language in 28 U.S.C. 2253(c) requiring a "substantial showing of the denial of a constitutional right." According to Amici, Section 2253(c) permits appellate review when reasonable jurists would debate whether an established constitutional rule applies to the particular facts, but not when reasonable jurists would debate the correctness of the asserted constitutional rule. See Br. 6 (contending that a COA "requires a constitutional claim whose application to the facts is debatable, not a claim that is only 'debatably constitutional'"). Amici thus argue that because, in their view, the constitutional rule petitioner asserts is not clearly established, the court of appeals correctly denied his application for a COA.

Amici's view is not supported by this Court's precedents, and it conflicts with the text and purpose of Section 2253(c). The principal basis for Amici's position is *Slack* v. *McDaniel*, 529 U.S. 473 (2000), in which this Court concluded that, to obtain a COA, an applicant must "demonstrate that reasonable jurists would find

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government therefore does not contend as it previously did in *Watts* that, in order to permit further review of petitioner's claims on remand, this Court must order the court of appeals to issue a COA. The government is filing a supplemental brief in *Watts* noting that, if this Court vacates the decision below, it would be appropriate to take the same action in that case.

the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. But nothing in that formulation "presumes that the COA applicant presents" an incontestable "constitutional theory." Br. 6. To the contrary, a jurist's "assessment of the constitutional claims," as referenced in *Slack*, generally would encompass consideration of the viability of the applicant's legal theory. That conclusion is supported by the articulation of the "substantial showing" standard elsewhere in *Slack* and in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983). Under that standard, an applicant "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (brackets in original; citation and emphasis omitted); see *Slack*, 529 U.S. at 484. That framework, which focuses courts on the questions and "issues presented," *ibid.*, is most naturally read to include not only claims as to which jurists can debate whether the particular facts satisfy an existing legal theory, but also claims as to which jurists can debate whether the legal theory is correct.

Consistent with this reading of Section 2253(c), courts of appeals have granted COAs to consider whether the asserted constitutional right exists. See, *e.g.*, *Paul* v. *United States*, 534 F.3d 832, 845 & n.6 (8th Cir. 2008) (noting that the court of appeals had granted a COA concerning "whether [the petitioner] has a constitutional right to competence during federal habeas corpus proceedings and, if so, whether that constitutional right was violated"). Courts have also framed the COA inquiry in language that encompasses review of "debatably constitutional" claims. See, *e.g.*, *United States* v.

*Martin*, 226 F.3d 1042, 1046 (9th Cir. 2000) (stating that, under *Slack*, "the court must decide whether the petition raises a debatable constitutional question") (emphasis omitted), cert. denied, 532 U.S. 1002 (2001). Amici point to no contrary authority prohibiting issuance of a COA on the ground that reasonable jurists could debate the correctness of the constitutional rule underlying the claim for relief.

Amici essentially seek to import into Section 2253(c) a limitation analogous to the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), barring appeal of any claim that is not based on a clearly established constitutional right. But the text of Section 2253(c) does not support such a limitation. As part of the same Act that contained Section 2253(c), Congress included language in a neighboring provision specifically prohibiting habeas relief on any claim adjudicated by a state court unless the challenged ruling, *inter alia*, violated "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Because Congress omitted similar "clearly established" language from Section 2253(c), such language is not properly read into that provision. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original).

There is no reason to believe, moreover, that Congress wished to burden courts with conducting a *Teague*-type inquiry in all cases simply in order to decide whether a COA is warranted. By enacting a "threshold prerequisite to appealability" in Section 2253(c), Congress sought, among other things, to reduce the ju-

dicial resources that habeas litigation consumes in the courts of appeals. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003). Amici's interpretation of Section 2253(c) would not advance that goal, because it would add an additional layer of analytical complexity to the COA determination. Under Amici's view, before deciding whether the applicant has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), courts would be required to undertake a threshold analysis of whether the applicant sought to apply an established constitutional rule to the particular facts of his case or instead sought to advance a new rule. This Court's cases make clear that such a distinction can often be subtle and difficult. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 381 (2000) (opinion of Stevens, J.) (noting "the 'inevitable difficulties' that come with 'attempting "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law"'") (citation omitted); *Wright* v. *West*, 505 U.S. 277, 311 (1992) (Souter, J., concurring in the judgment) (noting that, because constitutional rules can be stated at varying "level[s] of generality," determining whether an asserted rule satisfies the "requisite specificity calls for analytical care").

Nor would Amici's reading of Section 2253(c) serve any valid purpose. The object of the *Teague* rule, and of the "clearly established Federal law" limitation in 28 U.S.C. 2254(d)(1), is to further the interests in comity, federalism, and finality by generally barring collateral attack on a state conviction based on rules that did not exist at the time the conviction became final. See, *e.g.*,

*Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment) ("The comity interest served by *Teague* is in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought correct but now understood to be deficient on its own terms."). Requiring the court of appeals to conduct that analysis in every case at the COA stage is unnecessary to serve those values. While in some cases COAs may appropriately be denied because *Teague* would bar relief, that is not the only opportunity to apply *Teague*. If the COA is granted, and if the State asserts a *Teague* defense, the court of appeals can vindicate *Teague* interests in resolving the merits of the appeal. In any event, Amici do not contend that a COA is prohibited when the applicant asserts a rule that was announced after his conviction became final; instead, Amici would require that the asserted rule must "exist at the time the petitioner presents his habeas petition" to the district court. Br. 6. That interpretation of Section 2253(c) would serve only to insulate from appellate review a district court's habeas ruling that is exposed as incorrect by decisions issued while the petition is pending. The COA requirement was not intended to achieve that result.[4]

Amici have no basis for predicting that "perverse consequences" will follow unless Section 2253(c) is interpreted to exclude "debatably constitutional" claims. Br. 6-7. Courts are fully capable of denying appellate review when applicants attempt to "evade the COA gatekeeping function by inventing * * * specious

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[4] Amici's interpretation of Section 2253(c) would also result in a rule significantly more restrictive than *Teague* in some respects, because it would prohibit appellate review even when the claim rests on a purportedly "new" rule that fits within a *Teague* exception and even when the government does not raise a *Teague* defense.

claims" that purport to state a constitutional rule. *Id.* at 7. Amici's own arguments illustrate the point. In contending that litigants can "bootstrap" statutory or treaty violations into "debatably constitutional" claims, Amici emphasize the argument of petitioner in *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam), that an alleged failure to comply with the Vienna Convention should be regarded as a Supremacy Clause violation. Br. 6-7. But this Court had little difficulty recognizing that Medellin's treaty arguments did not appear to be constitutional in nature. See *Medellin*, 544 U.S. at 664, 666 (noting "doubt" that Medellin's "allegation of a *treaty* violation" could satisfy the COA requirement of "a substantial showing of the denial of a *constitutional* right") (emphasis in original); *id.* at 664 (concluding that treaty violations appear to "rank[] among the 'nonconstitutional lapses we have held not cognizable in a postconviction proceeding'") (citation omitted). Other courts asked to grant COAs will also be able to distinguish such non-constitutional issues from genuinely debatable constitutional claims.

2. Amici next present a series of arguments (Br. 7-17) intended to demonstrate that petitioner's claim of "sentencing error" is not even "debatably constitutional," but is instead purely statutory, and therefore outside the scope of Section 2253(c). In particular, Amici rely on a number of cases that, they contend, establish that petitioner's sentence does not implicate the Due Process Clause. Amici also dispute the applicability of precedents that petitioner cites as supporting the due process right he seeks to vindicate. Amici's contentions are without merit.

a. Amici cite two decisions, *Lewis* v. *Jeffers*, 497 U.S. 764 (1990), and *Pulley* v. *Harris*, 465 U.S. 37 (1984),

for the proposition that due process protections extend only to sentencing claims that result from rulings that are "arbitrary," "capricious," or "egregious." Br. 8-9 (quoting *Jeffers*, 497 U.S. at 780; *Harris*, 465 U.S. at 41). But those decisions are irrelevant to this case. Neither resolved the general question of when sentencing error violates a defendant's due process rights, much less the specific question of whether due process prohibits imposition of a sentence in excess of the statutory maximum based on an error of law.

The issue in *Jeffers* was whether the Ninth Circuit had properly reviewed a state court's determination that the defendant's conduct satisfied a statutory aggravating circumstance. The defendant argued that the state court had not properly weighed the evidence in finding that the circumstance applied. This Court rejected that contention, explaining that it "reduces, in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of his case." *Jeffers*, 497 U.S. at 780. The Court therefore reversed the Ninth Circuit's decision, which had invalidated the state-court ruling based on "the sort of *de novo*" evidentiary review the defendant proposed. *Ibid.*

*Jeffers* thus concerned a sentence that the state court found to be authorized by state law and that resulted from the application of a concededly correct legal standard to the particular facts. That decision has no relevance to this case, which concerns a sentence that all agree *exceeds* the statutory maximum and that resulted from a pure and concededly *incorrect* conclusion of law by a federal court interpreting an Act of Congress. *Jeffers* did not state, moreover, that a sentencing error is unreviewable under the Due Process Clause, but rather held that a state court's application of an aggra-

vating circumstance violates that clause when it fails to satisfy a standard based on *Jackson* v. *Virginia*, 443 U.S. 307 (1979). And, contrary to Amici's contention, the Court in *Lewis* did not purport to announce that such a situation was "[t]he only circumstance in which * * * a sentencing error might present a constitutional claim." Br. 8.

*Harris* is similarly irrelevant. In that case, the defendant did not allege a due process violation and did not dispute that state law authorized the sentence he received. Rather, the claim in *Harris* was that a state court's failure to conduct "proportionality review"—comparing the defendant's sentence to those of other offenders—violated the Eighth Amendment's prohibition on cruel and unusual punishment. 465 U.S. at 39-40. The Court rejected the defendant's argument on the ground that the Eighth Amendment does not invariably require such proportionality analysis. *Id.* at 50-51. That the Court "denied the constitutional nature of the claim" (Br. 8) in *Harris* therefore has no relevance to the constitutional character of the claim in this case.

b. Amici also rely on two courts of appeals decisions addressing claims of error in the application of the federal Sentencing Guidelines. See Br. 9-11 (discussing *United States* v. *Cepero*, 224 F.3d 256, 263 (3rd Cir. 2000) (en banc), cert. denied, 531 U.S. 1114 (2001), and *Buggs* v. *United States*, 153 F.3d 439, 443 (7th Cir. 1998)). In both of those decisions, the habeas petitioner challenged his sentence based on disagreement with the district court's finding concerning the type or amount of drugs attributable to him for purposes of calculating the applicable Guidelines range. *Cepero*, 224 F.3d at 258; *Buggs*, 153 F.3d at 441. The court of appeals in each case denied a COA, concluding that allegations that the

district court miscalculated the Guidelines range do not assert a constitutional claim cognizable under 28 U.S.C. 2253(c)(2). *Cepero*, 224 F.3d at 267-268; *Buggs*, 153 F.3d at 442-443.

Amici contend that *Cepero* and *Buggs* are "indistinguishable" from this case (Br. 9) and therefore assert that a holding that petitioner's allegation of sentencing error states a constitutional claim would necessarily conflict with those decisions. *Id.* at 11. Amici are incorrect that *Cepero* and *Buggs* addressed the question presented here.

Amici's argument rests on the premise that, when *Cepero* and *Buggs* were decided, the top of the Sentencing Guidelines range had the same legal effect as the statutory maximum sentence. But that premise is false: under the regime that existed before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), district courts had discretion in appropriate circumstances to increase a sentence above the applicable Guidelines range, up to the true maximum set forth by statute. See, *e.g.*, Sentencing Guidelines § 5K2.0(a) and (a)(2)(B) (permitting "upward departures" from the Guidelines range when, *inter alia*, "there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence."). Thus, although Amici emphasize this Court's description of the pre-*Booker* Guidelines regime as "mandatory" and "binding" for purposes of the Sixth Amendment, Br. 10 (quoting *Booker*, 543 U.S. at 233), courts at the time of *Cepero* and *Buggs* did not conceive of the Guidelines as defining the limits of the court's sentencing power in the same manner as a statutory maximum. As this Court recently explained, even under a "mandatory" guidelines regime, "the top sen-

tence in a guidelines range is generally not really the 'maximum term . . . prescribed by law' for the 'offense' because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1792 (2008).

Contrary to Amici's argument, *Cepero* and *Buggs* therefore are readily distinguishable. The petitioners in those cases claimed misapplication of the Guidelines concerning a sentence that the district court had statutory authority to impose. The petitioner in this case, by contrast, challenges the constitutionality of a sentence that indisputably exceeds the limits authorized by statute. *Cepero* and *Buggs* do not resolve whether that fundamentally different claim presents a constitutional issue.

c. Amici seek further support for their contention that petitioner's sentencing claim is non-constitutional by analogy to cases involving other types of habeas challenges. Br. 11-14. In particular, Amici characterize this Court's decisions as refusing to recognize the "constitutional" status of habeas claims asserting that errors in statutory interpretation resulted in wrongful conviction. Based on that characterization, Amici argue that a claim cannot be deemed "constitutional" when it asserts that an error of statutory interpretation resulted only in an excessive sentence. That contention fails. This Court's decisions establish that, in certain circumstances, invalid convictions resulting from clear errors of law do violate due process, and those decisions in fact support petitioner's analogous sentencing claim.

The cases on which Amici rely, *Davis* v. *United States*, 417 U.S. 333 (1974), and *Gilmore* v. *Taylor*, 508 U.S. 333 (1993), do not stand for the proposition that

legal errors resulting in invalid convictions fail to state a constitutional claim. In *Davis*, this Court held that a prisoner could challenge on habeas his conviction for violating regulations that had since been invalidated. In reaching that conclusion, the Court did not "refuse[] to characterize" the erroneous conviction as constitutional error. Br. 11. The Court had no need to resolve that question of characterization because it concluded that, in any event, 28 U.S.C. 2255 permits federal prisoners to assert a challenge to confinement alleged to be "in violation of the Constitution *or laws* of the United States." *Davis*, 417 U.S. at 342-343 (quoting 28 U.S.C. 2255). *Davis* therefore is not properly read as a decision about the proper classification of the challenge; Amici cannot convert the Court's holding that the prisoner was entitled to pursue habeas relief into an implicit rejection of the constitutional status of his claims.

*Taylor* is even further afield. The sole question in that case was whether a Seventh Circuit decision invalidating a pattern jury instruction was retroactive under *Teague, supra*. The Court said nothing about whether a legal error resulting in an invalid conviction states a due process claim. Amici cite this Court's statement that "[i]nstructional errors of state law generally may not form the basis for federal habeas relief." Br. 12 (quoting *Taylor*, 508 U.S. at 344). But that observation arose in the course of rejecting the petitioner's contention that due process protects a defendant from "confusing [jury] instructions on state law which prevent a jury from considering an affirmative defense." *Taylor*, 508 U.S. at 544. *Taylor* reaffirmed the principle that due process prohibits a conviction based on jury instructions that permit conviction without proof of conduct satisfying the elements of the crime. See *id.* at 344 & n.2.

More fundamentally, Amici misapprehend the significance of statements in decisions such as *Taylor*, *Jeffers*, *Harris*, and *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991), that "federal habeas corpus relief does not lie for errors of state law," *Jeffers*, 497 U.S. at 780; see *Harris*, 465 U.S. at 41 ("A federal court may not issue the writ based on a perceived error of state law."). It is true of course that a state-law violation does not automatically establish a due process violation. But contrary to Amici's interpretation, that observation does not mean that *no* state-law violation can give rise to such a claim.

In fact, this Court has squarely held that due process prohibits a conviction for conduct incorrectly deemed criminal as a result of an erroneous statutory interpretation that is invalidated by a subsequent decision. Thus, in *Fiore* v. *White*, 531 U.S. 225 (2001) (per curiam), a habeas petitioner challenged his conviction under a statute that, as interpreted by the state supreme court in a decision issued after the petitioner's conviction became final, did not reach his conduct. The Court held that the petitioner's "conviction and continued incarceration on this charge violate due process." *Id.* at 228. "The simple, inevitable conclusion," this Court ruled, is that a State may not, "consistently with the Federal Due Process Clause, convict [the petitioner] for conduct that its criminal statute, as properly interpreted," does not prohibit. *Id.* at 228-229; see *Bunkley* v. *Florida*, 538 U.S. 835, 840-842 (2003) (per curiam) (applying the *Fiore* due process principle to invalidate a conviction for conduct that the state supreme court later interpreted the statute not to cover).

*Fiore* and *Bunkley* rest on the due process rules announced in *Jackson* v. *Virginia*, *supra*, and *In re Winship*, 397 U.S. 358 (1970), and this Court has "not

extended *Winship*'s protection to proof of prior convictions used to support recidivism enhancements." *Dretke* v. *Haley*, 541 U.S. 386, 395 (2004). But far from undermining petitioner's claim that due process prohibits imposition of a sentence in excess of the statutory maximum based on an error of law, this Court's decisions addressing the constitutional significance of convicting a defendant based on conduct that is not criminal under state law illustrate that some errors of state law that result in the imposition of criminal penalties not intended or authorized by the legislature do produce due process violations.

d. Amici also dispute the applicability of the precedents on which petitioner relies. They argue (Br. 14-17) that *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), do not support petitioner's asserted constitutional rule. But as the government explained in its response to the petition in *Watts*, *Whalen* supports a claim that due process prohibits imposition of a sentence in excess of the statutory maximum based on an error of law, and *Hicks* supports a claim that due process is offended when such an error deprives the defendant of the court's discretion to impose a sentence lower than the maximum. U.S. Br. at 8-9, *Watts*, *supra* (No. 08-7757). Those cases therefore furnish sufficient grounds to issue a COA on petitioner's challenge to his ACCA sentence.

Amici attempt to characterize *Whalen* as a case solely about the Double Jeopardy Clause, contending that the Court there held "only that the Double Jeopardy Clause prohibits consecutive sentences when Congress intended multiple convictions to be treated as a single criminal offense." Br. 15. Amici also dismiss as "dictum" this Court's statement in *Whalen* that, inde-

pendent of the Double Jeopardy Clause, the "Due Process Clause of the Fourteenth Amendment * * * would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Whalen*, 445 U.S. at 690 n.4.

But *Whalen* cannot be so easily limited. That case held broadly that a federal defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690. In the circumstances of *Whalen*, involving cumulative punishments for a single offense, the Court located that rule in the Double Jeopardy Clause. The Court emphasized, however, that this double jeopardy guarantee is "simply one aspect" of the more "basic principle" that courts may not sentence a defendant beyond what the law permits. *Id.* at 689. The Court recognized that, in the federal system, that rule is rooted in the "doctrine of separation of powers," and in a state prosecution, the same principle would follow from the Due Process Clause of the Fourteenth Amendment. *Id.* at 689 n.4. Thus, contrary to Amici's characterization, *Whalen* is not a Double Jeopardy Clause decision that "muses about" the Due Process Clause in dicta. Br. 15. *Whalen* instead states a basic constitutional principle—courts may not sentence a defendant in excess of statutory limits—that is embodied in both of those provisions. That principle directly supports petitioner's due process challenge to his sentence under the ACCA for conduct that does not fall within that statute.

Amici attack petitioner's reliance on *Hicks* by contending that, because "Hicks' sentence was *within* legally permissible bounds," that decision "had nothing to do with a sentence that exceeded a statutory maximum."

Br. 17. But petitioner does not cite *Hicks* primarily as support for the proposition that due process is violated by a sentence that exceeds the maximum permitted by law. Instead, petitioner contends that *Hicks* establishes "a related principle" that due process is violated when "the sentencer is erroneously prevented from exercising its statutory discretion to impose a lesser sentence" than the maximum. Pet. 16; see U.S. Br. at 9, *Watts*, *supra* (No. 08-7757) (relying on *Hicks* in observing that the petitioner could make a substantial showing of a due process violation because he "was deprived of the possibility that the district court would have exercised its discretion, as it could for a non-ACCA defendant, to impose a term of imprisonment shorter than ten years."). Amici offer no response to that separate basis for petitioner's due process claim other than to suggest that *Hicks* applies only to jury sentencing. Br. 17. But at least one court has stated that *Hicks* "is not * * * limited to imposition of sentences by *juries*." *Prater* v. *Maggio*, 686 F.2d 346, 350 n.8 (5th Cir. 1982). That court concluded that where, as "[i]n this case, the judge —not the jury—was vested with statutory discretion in sentencing," the *Hicks* principle was applicable. *Ibid.*

3. In addition to disputing the constitutional basis for petitioner's arguments, Amici contend (Br. 17-26) that the court of appeals properly denied a COA on the grounds that petitioner's claim is *Teague*-barred and that petitioner procedurally defaulted the due process challenge to his ACCA sentence by failing to assert it on direct appeal.[5] In the circumstances presented here,

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[5] Amici separately argue (Br. 25-26) that the petitioner in *Watts*, *supra*, also procedurally defaulted his claims by failing to assert a constitutional challenge to his ACCA sentence in his habeas petition. They assert that "[t]he Government mischaracterize[d] the record" in

those grounds do not justify denying petitioner the opportunity to seek relief from his sentence.

Courts may, of course, decline to issue a COA permitting review of a meritorious constitutional claim based on *Teague* or procedural barriers. The court of appeals, however, did not mention, much less rely on, procedural grounds in denying the COA in this case. Instead, the court of appeals rested its decision on the conclusion that petitioner had failed to make a "substantial showing of the denial of a constitutional right." Pet. App. 1a. For the reasons set forth above, the government believes that this ruling is incorrect. The government did not invoke *Teague* or procedural default as a

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*Watts* by "impl[ying]" otherwise. Br. 25. Quite apart from the inappropriateness of these arguments concerning the procedural history of a different case, Amici's contentions lack merit. As an initial matter, the government simply quoted the district court's description of Watts's claim and did not characterize it, let alone "mischaracteriz[e]" it, as Amici contend. U.S. Br. at 3, *Watts*, *supra* (No. 08-7757). In any event, Amici are incorrect that Watts failed to assert a due process challenge to his ACCA sentence in the district court. On two separate printed forms that the district court required Watts to use in initiating his habeas action, Watts asserted, as "Ground Three" for relief: "*Due Process Violation*[:] Trial court erred in finding that a conviction for carrying concealed weapon qualified as a violent felony under Armed Career Criminal Act." First Amended Motion to Vacate, Set Aside, Or Correct Sentence at 7, *Watts* v. *United States*, No. 8:07-cv-665-SCB (M.D. Fla. filed May 2, 2007) (emphasis added); see Second Amended Motion to Vacate, Set Aside, Or Correct Sentence at 7, *Watts* v. *United States*, No. 8:07-cv-665-SCB (M.D. Fla. filed May 21, 2007). Based on those filings, the district court correctly stated, in the portion of the decision the government quoted in its *Watts* response: "In ground three, Watts alleges that the trial court violated his Due Process rights. Watts contends that the trial court erred in finding that a conviction for carrying a concealed weapon qualified as a violent felony under the Armed Career Criminal Act." Pet. App. at A7, *Watts*, *supra*, (No. 08-7757). (We are serving a copy of this brief on the petitioner in *Watts*.)

basis for denying the COA in the court of appeals, nor does the government seek to interpose such arguments at this stage of the proceedings.

Petitioner has been sentenced to a term of imprisonment that all agree is in excess of what the law permits, based on a pure legal error that was exposed as incorrect by intervening decisions of this Court and the court of appeals. Petitioner has had no other opportunity to assert these claims. The government believes that in these circumstances the interests of justice warrant relief, and the government therefore does not oppose such relief by asserting discretionary procedural defenses. The government submits that the appropriate course is to grant the petition for a writ of certiorari, vacate the judgment, and remand to permit the court of appeals to reconsider whether, in light of the government's position, petitioner should be permitted a further opportunity to advance his claims.[6]

4. As the government has previously explained, see U.S. Br. at 8, *Watts*, *supra* (No. 08-7757), the court of

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[6] As an additional reason for this Court to deny review, Amici refer (Br. 26-27) to the possibility that petitioner could seek relief under 28 U.S.C. 2241 or 2255(e). But in the circumstances presented here, and given the already protracted litigation in this case, there is no reason to require petitioner to initiate a new action in the district court seeking the same relief under a different statutory provision. It is unclear, moreover, whether petitioner could invoke Section 2241 or 2255(e) under Eleventh Circuit law. See *Wofford* v. *Scott*, 177 F.3d 1236, 1244-1245 (1999) (declining to endorse the holding of another court of appeals that a prisoner could pursue relief through Section 2255 based on a claim "involving a 'fundamental defect' in sentencing," even "where the petitioner had not had an opportunity to obtain judicial correction of that defect earlier"). Nor would petitioner have an easier time in that proceeding overcoming the procedural-default rules that Amici contend preclude review in the court of appeals.

appeals on remand need not decide any more than that petitioner's constitutional claim is debatable. That conclusion would support the issuance of a COA under Section 2253(c), and the court of appeals should then remand the case to the district court. The district court, in the first instance, should have the opportunity to reconsider petitioner's constitutional claim in light of the change in law since its decision. See 28 U.S.C. 2106 (authorizing an appellate court to "remand the cause and * * * require such further proceedings to be had as may be just under the circumstances").

If the court of appeals were to remand to the district court for reconsideration of the due process claim, the district court would also be entitled to consider, as a threshold question antecedent to the constitutional issue, whether relief should be granted as a statutory matter because, in light of *Begay*, *Archer*, and *Canty*, see p. 5-6 & note 2, *supra*, petitioner's sentence exceeds the maximum term authorized. That is a cognizable ground for relief under Section 2255. See 28 U.S.C. 2255(a) (permitting relief, *inter alia*, when the movant's "sentence was in excess of the maximum authorized by law"); *cf. Davis*, 417 U.S. at 342-346 (holding that statutory as well as constitutional claims are cognizable under Section 2255, if the error of law constitutes a fundamental defect). "The prospect of a constitutional argument is needed to permit the COA to be granted; but once back in district court [petitioner] is free—on a first Section 2255 motion—to proffer non-constitutional claims." *Mateo* v. *United States*, 310 F.3d 39, 41 (1st Cir. 2002). Consideration of a statutory claim for relief, which the United States would not oppose on the facts of this case, would accord with bedrock principles of consti-

tutional avoidance. See *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the government's position.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

DEMARICK HUNTER,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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In her brief, the Solicitor General confesses error and agrees that a COA should issue. Indeed, she acknowledges that the just result in this case would be for Hunter to receive relief in the district court from his unlawful sentence. However, her suggested remedy—a GVR from this Court—would not guarantee that result, and might only delay an already prolonged process. Only a summary reversal would establish the error of the decision below and ensure that Hunter is permitted to take the next step toward obtaining the ultimate relief to which he is entitled.

## I. THE ELEVENTH CIRCUIT COMMITTED LEGAL ERROR WHEN IT DENIED A COA TO REVIEW HUNTER'S CONCEDEDLY UNLAWFUL SENTENCE.

There is uniform agreement that the 188-month sentence Hunter is currently serving is unlawful and exceeds the maximum sentence authorized under the statute by more than five years. As the government now concedes, the application of ACCA's enhancement provisions to Hunter's sentence was a "pure legal error." U.S. Br. 24. Indeed, the Eleventh Circuit itself—joining every other circuit that has addressed the question—has recently held definitively that a conviction for carrying a concealed weapon does not constitute a "violent felony" under ACCA. *See United States v. Canty*, 570 F.3d 1251, 1255 (11th Cir. 2009) (citing *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)).

It is also undisputed that Hunter satisfied the legal standard for receiving a COA. As the government concedes, due process prohibits imposition of a sentence that exceeds the statutory maximum, or depri-

vation of the sentencing court's discretion to impose a lesser sentence than the maximum. U.S. Br. 20-22 (citing *Whalen v. United States*, 445 U.S. 684 (1980), and *Hicks v. Oklahoma*, 447 U.S. 343 (1980)). Therefore, at the very least, it is beyond dispute that Hunter has demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

Furthermore, for the reasons given in the government's brief, the arguments of Amici Criminal Law and Habeas Corpus Scholars, attempting to defend the Eleventh Circuit's decision, are unsound and fallacious. *See* U.S. Br. 13-22. It is untrue that a COA is limited to disputes concerning established constitutional theories. The relevant authority of this Court and the text and purpose of 28 U.S.C. § 2253(c)(2) establish that a COA may issue where debatable issues regarding the constitutional nature of a claim are presented. *See id.* at 8-13. Amici's comparison between habeas challenges to the application of the sentencing guidelines and the issue presented here is also flawed because the former do not concern sentences that exceed the sentencing court's statutory authority. *See id.* at 15-17. Moreover, one line of cases that Amici contend is analogous to the instant case—habeas challenges to wrongful convictions—specifically demonstrates that a criminal conviction premised on a statutory interpretation later held invalid violates due process. *See id.* at 17-20 (citing *Fiore v. White*, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003)).

Accordingly, Hunter's entitlement to receive a COA is not in dispute.

## II. THIS COURT SHOULD SUMMARILY REVERSE THE ELEVENTH CIRCUIT'S DECISION.

Although the Solicitor General concedes that the decision below is manifestly incorrect, she contends that the appropriate remedy is to issue a GVR order so that the Eleventh Circuit can reconsider its decision in light of the government's position. U.S. Br. 24. That remedy might be appropriate in a situation where the lower court previously actually relied on the position of the government, or where its views were not already well entrenched. But here, after the last remand from this Court to reconsider the denial of the COA in light of *Begay v. United States*, 128 S. Ct. 1581 (2008), the Eleventh Circuit did not even wait for the government to express its views before rendering an essentially identical decision for the same reason. U.S. Br. 6. That was, in fact, the *fourth* consecutive decision by the court of appeals erroneously denying Hunter a COA for failure to show the denial of a constitutional right. Pet. App. 1a-4a, 5a, 7a, 8a. A GVR by definition would not tell the Eleventh Circuit that any of those rulings was incorrect, *see Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), and it would not preclude that court from making the wrong decision for a fifth time. Under these circumstances, a GVR would not serve its purpose of "improv[ing] the fairness and accuracy of judicial outcomes." *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam).

Moreover, there is no need for an open-ended remand to decide whether some other obstacle—such as discretionary procedural defenses—stands

in the way of issuing the COA. The Solicitor General states that in the "interests of justice" the government "did not invoke *Teague* or procedural default as a basis for denying the COA in the court of appeals, nor does the government seek to interpose such arguments at this stage of the proceedings." U.S. Br. 23-24. This Court has indicated that an express waiver of a procedural defense is binding and would prevent the lower court from applying any such bars. *See, e.g., Day v. McDonough*, 547 U.S. 198, 202 (2006) ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."). Here, that waiver comes from the highest level of the Department of Justice.

Finally, a GVR would only introduce further unwarranted uncertainty and delay into these exceedingly protracted proceedings. *See* U.S. Br. 24 n.6 (also expressing concern about the length of this litigation). Hunter has spent the last two-and-a-half years litigating the threshold question of his right to bring an appeal to challenge his unlawful sentence, and will be no closer after a GVR. He has already served nearly 76 months of that sentence. Another round of litigation carries the significant risk that he will end up serving more time than he will receive upon resentencing—a resentencing that the government supports. *See* Pet. Br. 5. Under these circumstances, a GVR is an inadequate remedy and inferior to summary reversal. *See Lawrence*, 516 U.S. at 168 ("[I]f the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.").

As the government itself advocates, "the interests of justice warrant relief" here. U.S. Br. 24. That end

is best served by resolving this matter in a correct and timely manner, as only summary reversal can accomplish.

## CONCLUSION

For the foregoing reasons, the judgment below should be summarily reversed.

December 9, 2009

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No. 09-122

In The
# Supreme Court of the United States

DEMARICK HUNTER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR CRIMINAL LAW AND HABEAS CORPUS SCHOLARS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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## QUESTIONS PRESENTED

1. Whether, under *Begay* v. *United States*, 128 S.Ct. 1581 (2008), a prior conviction for carrying a concealed weapon constitutes a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e).

2. Whether a legally erroneous application of ACCA, which resulted in a mandatory minimum sentence five years above the otherwise applicable statutory maximum for the offense, violates due process.

3. Whether the decision of the Eleventh Circuit denying a certificate of appealability ("COA") on habeas review should be summarily reversed when the Government has confessed that it was error to deny the COA.

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## INTEREST OF *AMICI*

*Amici curiae* are law scholars who write and teach about this Court's criminal law and habeas corpus jurisprudence.[1] Stephanos Bibas is Professor of Law at the University of Pennsylvania, where he researches and teaches on criminal law and procedure. Jonathan F. Mitchell is Assistant Professor of Law at George Mason University; his research and teaching include criminal procedure and habeas corpus. Adam K. Mortara is Lecturer in Law at the University of Chicago Law School, and teaches courses in federal courts and habeas corpus.[2]

*Amici* have a professional interest in illuminating this Court's consideration of the important and complicated questions presented in this case.

---

[1] The parties have consented to the filing of this brief and such consents are being lodged herewith. The parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] The views and positions taken in this brief are the authors' own, and are not intended to represent the views of their respective academic institutions.

## REASONS FOR DENYING THE PETITION

The Eleventh Circuit correctly denied Hunter's request for a COA, and this Court should not disturb that decision.

*First*, the Government's confession of error does not compel the issuance of a COA. Whether Hunter deserves a COA under 28 U.S.C. 2253(c)(2) is a jurisdictional question this Court must determine without regard to the parties' stipulations.

*Second*, Section 2253(c)(2) allows COAs only for applicants who make "a substantial showing of the denial of a *constitutional* right." Hunter has not demonstrated that the constitutional right he asserts even exists.

*Third*, Hunter's "constitutional" right (to the extent it exists at all) is *Teague*-barred and therefore undeserving of a COA.

*Fourth*, Hunter has procedurally defaulted on both his statutory sentencing error claim and his "constitutional" claim.

*Fifth*, both Hunter and Watts should pursue their statutory *Begay* claim in habeas proceedings under 28 U.S.C. 2241, by asserting that Section 2255 is "inadequate or ineffective" to test the legality of their detention. 28 U.S.C. 2255(e).

This Court should therefore deny both petitions. Alternatively, the Court should grant certiorari to consider these important questions regarding the

meaning of Section 2253(c)(2) and the Due Process Clause.

## I. This Court Should Not Summarily Dispose Of This Case In Light Of The Government's Confession of Error

In the related petition in *Watts* v. *United States*, No. 08-7757, the Government confesses error in *Watts* and this case. See Brief for the United States in No. 08-7757 ("Gov't *Watts* Br.") at 11. The Government asks this Court to grant the *Watts* petition and vacate and remand to the Eleventh Circuit *with instructions to grant a COA*. *Id.* at 14. The Government will presumably ask this Court for the same action in this case. *Amici* believe such a disposition inappropriate.

When this Court "GVRs" cases in light of a confession of error, it nearly always allows the lower court to reconsider the case in the first instance, and refrains from directing the resolution on remand. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (collecting cases, none of which involved instructions on how to dispose of the merits); *id.* at 171 (referring to "the legitimacy of GVRs on the basis of confessions of error *without determining the merits*") (emphasis added); *Stutson* v. *United States*, 516 U.S. 163, 182-183 (1996) (Scalia, J., dissenting) (questioning but accepting the practice of GVR in light of a confession of error with no merits examination). What the Government seeks from this Court

in *Watts* is instead an unexplained ruling that *Watts* gets a COA. Such an order would disguise a summary reversal as a GVR.

Such a summary disposition is further inappropriate because the Government confesses error as to a *jurisdictional* issue—the issuance of a COA. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 335-336 (2003) (describing the COA as a "jurisdictional prerequisite" to an appeal from a district court's denial of post-conviction relief). The Government cannot stipulate that Hunter and Watts satisfy Section 2253(c)(2)'s requirements for a COA, any more than it could stipulate that an interlocutory order satisfies the "collateral order" doctrine's requirements for appellate jurisdiction.[3] See *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003); cf. also *Young* v. *United States*, 315 U.S. 257, 258-259 (1942) (holding that the Government's confessions of error "does not relieve this

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[3] For the same reason, the Government further errs in suggesting that the Court can avoid the constitutional questions in this case by instructing the Eleventh Circuit to remand to the District Court. Gov't *Watts* Br. 12-13. Without a COA no appellate court has jurisdiction to vacate the District Court's order denying Hunter's Section 2255 motion. Cf. *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring) (criticizing appellate courts for bypassing COA determination in order to address the merits). And no COA can issue unless Hunter shows the "denial of a constitutional right." The Government's citation of 28 U.S.C. 2106 is not relevant. Gov't *Watts* Br. 12. As the Government acknowledges, the Eleventh Circuit must first issue a COA before it can remand the case to the District Court under Section 2106. *Id.* at 11.

Court of the performance of the judicial function. . . . [O]ur judicial obligations compel us to examine independently the errors confessed.").

## II. The Eleventh Circuit Correctly Denied Hunter's COA Application Because It Did Not Present A "Constitutional" Claim Under 28 U.S.C. 2253(c)(2)

### A. Section 2253(c)(2) Does Not Permit COAs For "Debatably Constitutional" Claims

Section 2253(c)(2) prohibits certificates of appealability unless an applicant makes "a substantial showing of the denial of a *constitutional* right."

Congress enacted this statute in 1996. The previous regime allowed habeas petitioners to appeal if they made "a substantial showing of the denial of [a] *federal* right." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983). The 1996 amendment thus eliminated appeals from post-conviction proceedings that present non-constitutional claims, such as violations of federal statutory rights or treaty obligations. See *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000) ("[W]e give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word 'constitutional.'"); *Medellin* v. *Dretke*, 544 U.S. 660, 666 (2005) (per curiam). See also *United States* v. *Cepero*, 224 F.3d 256, 264 (CA3 2000) (en banc) ("The term 'constitutional right' means something very

different from the term 'federal right,' and . . . we give effect to the change.") (citation omitted).

*Slack* held that Section 2253(c)(2) requires COA applicants to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484. This formulation presumes that the COA applicant presents a viable constitutional theory. The circuit justice or judge must then assess whether reasonable jurists could disagree about its application to the case at hand. In other words, in order to make "a substantial showing of the denial of a constitutional right" that right should at least exist at the time the petitioner presents his habeas petition.

In contrast, the Government argues that a COA may issue whenever the applicant presents a *debatably constitutional* claim, *i.e.*, whenever it is debatable whether the claim is constitutionally cognizable. Gov't *Watts* Br. 8. But *Slack* is the authoritative construction of 28 U.S.C. 2253(c)(2). And *Slack* requires a constitutional claim whose application to the facts is debatable, not a claim that is only "debatably constitutional."

The Government's interpretation would have perverse consequences. Under the Government's rule, petitioners could use the Supremacy Clause or the Due Process Clause to bootstrap any statutory violation (state or federal), or even a treaty violation, into a "debatably constitutional" claim. See, *e.g.*, *Medellin* v. *Dretke*, No. 04-5928 Petr's Reply Br. 20

(arguing that an alleged violation of the Vienna Convention on Consular Relations "should be regarded as a violation of a constitutional right under the Supremacy Clause for purposes of 28 U.S.C. § 2253(c)(2)."). And the Government's view invites COA applicants to evade the COA gatekeeping function by inventing "debatable" and tailor-made "constitutional claims" built from their specific facts.

The Government's proposed interpretation disrespects Congress' decision to eliminate non-constitutional and specious claims from COA eligibility. To succeed, Hunter must rely on an existing constitutional right, not a hypothetical one. Since the constitutional right Hunter asserts does not exist, he cannot obtain a COA.

### B. This Court's Precedents, And Those Of The Courts Of Appeals, Reject The Notion That Sentencing Errors Present "Constitutional" Claims Under 28 U.S.C. 2253(c)(2)

Hunter argues that the Due Process Clauses prohibit a court from sentencing a defendant through statutory misinterpretation. See Petn. 15 ("[S]entencing a defendant to a term of imprisonment based upon a statute that indisputably does not apply to him violates basic principles of due process."). The Government's position is more hedged; it argued in *Watts* that this proposition is debatable enough to warrant a COA. See Gov't *Watts* Br. 8 (arguing that

Watts "can make a substantial showing that it violates due process to impose a sentence on a defendant in excess of the maximum term authorized by law."). But this Court's precedents and the precedents of the Courts of Appeals are incompatible with either view.

In *Lewis* v. *Jeffers*, 497 U.S. 764 (1990), a habeas petitioner claimed that the Arizona courts had misinterpreted a statutory aggravating circumstance that rendered the petitioner eligible for capital punishment. The Court refused to entertain the claim because "habeas corpus relief does not lie for errors of state law." *Id.* at 780. The only circumstance in which such a sentencing error might present a constitutional claim is if "the state court's finding was so arbitrary or capricious as to constitute an independent [procedural] due process or Eighth Amendment violation." *Id. Pulley* v. *Harris*, 465 U.S. 37 (1984), involved a due-process claim based on the state's denial of an allegedly state-law mandated proportionality review. The Court again denied the constitutional nature of the claim. *Id.* at 41; cf. also *Estelle* v. *McGuire*, 502 U.S. 62, 67-69 (1991) (holding that introducing recidivism evidence in alleged violation of state law does not violate due process).

*Hunter* asserts a due-process right to a sentence that is free of *any* legal error that increases his punishment. Although Hunter's alleged ACCA error may have violated a federal statute, this cannot present a *constitutional* claim unless the sentencing court's errors were "arbitrary or capricious" or "egregious." *Lewis*, 497 U.S. at 780; *Pulley*, 465 U.S.

at 875. Hunter does not even contend that his sentencing court acted in such a fashion. Nor could he, given that his sentence was consistent with the law as it existed prior to *Begay* v. *United States*, 128 S.Ct. 1581 (2008).[4]

In reaching its conclusion that Hunter's claim is statutory and not constitutional (and therefore not the proper subject of a COA), the Eleventh Circuit cited *United States* v. *Cepero*, 224 F.3d 263 (CA3 2000) (en banc) and *Buggs* v. *United States*, 153 F.3d 439, 443 (CA7 1998). Petn. 4a. At a time when the Sentencing Guidelines were mandatory, these decisions held that error in Guidelines application raises no constitutional claim and therefore cannot justify a COA under Section 2253(c)(2). Cf. *United States* v. *Segler*, 37 F.3d 1131, 1133-1134 (CA5 1994) (contention that district court misapplied mandatory guidelines as to career offender status is not constitutional error).

Hunter and the Government concede that *Cepero* and *Buggs* were correctly decided. Petn. 20; Gov't *Watts* Br. 7. Yet these cases are indistinguishable from Hunter's.

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[4] Both *Lewis* and *Pulley* deal with complaints about state court implementation of state sentencing law, but there is no distinction between state and federal law with respect to the due-process claim Hunter makes—and Hunter offers none, citing state and federal law cases interchangeably. Petn. 16-18.

In *Cepero*, the petitioner sought relief from a mandatory sentence enhancement related to his conspiracy to distribute cocaine base. *Cepero*, 224 F.3d at 267. *Buggs* is even more like the present case. There, a change in the Sentencing Guidelines made after Buggs' direct appeal would have lowered the range applicable to him at sentencing. *Buggs*, 153 F.3d at 442-443. Both *Cepero* and *Buggs* held that error in imposing a mandatory enhancement under the Guidelines cannot meet Section 2253(c)(2)'s required "denial of a constitutional right." *Cepero*, 224 F.3d at 268; *Buggs*, 153 F.3d at 443.

The Government's attempt to distinguish *Cepero* and *Buggs* amounts to an *ipse dixit* based on a false premise. See Gov't *Watts* Br. 7 ("Here, the Sentencing Guidelines are not at issue, and petitioner does not claim a misapplication of law concerning a sentence *that the court had discretion to impose.*") (emphasis added). Hunter just parrots the Government's line. See Petn. 20 ("[T]he authorities cited by the Eleventh Circuit . . . concerned sentences that were within the court's authority and discretion to impose.").

But at the time of *Cepero* and *Buggs* and prior to *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were mandatory just like the ACCA. Sentencing courts did not have "discretion" to ignore or misapply the guidelines at issue in *Cepero* and *Buggs*, and the Government's suggestion to the contrary is false. See *Booker*, 543 U.S. at 233 ("This conclusion rests on the premise . . . *that the relevant sentencing rules are mandatory and impose binding*

*requirements on all sentencing judges*.") (emphasis added); *id.* at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."); *id.* at 237-238 (rejecting any distinction between Congressional statutes and the Commission's Guidelines in connection with the Sixth Amendment *Apprendi* analysis).

The Government and Hunter fail to raise any accurate distinction between this case and *Cepero* or *Buggs*. To summarily dispose of the Eleventh Circuit's judgment here would also set aside the considered opinions of the Third and Seventh Circuits on the same subject.

### C. The Court's Prior Decisions In Analogous Contexts Show That Hunter's Claim Is Not Constitutional

The theoretical underpinning of the right Hunter calls "constitutional" is a liberty interest to be free from unlawful imprisonment. Hunter's specific claim is that garden-variety error in statutory interpretation violates the Due Process Clause whenever it increases the punishment for a defendant's action beyond what a statute directs. Yet the Court has refused to characterize such interpretive errors as constitutional violations *even when they lead to wrongful convictions*.

In *Davis* v. *United States*, 417 U.S. 333 (1974), the petitioner had been convicted under Selective Service regulations that this Court held invalid in a case decided after the petitioner's conviction became final. *Id.* at 337-338. The lower federal courts rejected Davis' Section 2255 motion, but the Court reversed and held that Davis' claim was cognizable under Section 2255. Yet the Court refused to adopt the theory that courts violate a defendant's constitutional due-process rights whenever they misinterpret laws governing conviction (or sentence). Instead, the Court allowed Davis' claim only because Section 2255(a) explicitly authorizes post-conviction relief for certain *non-constitutional* errors, including "custody in violation of the . . . laws of the United States. . . ." 28 U.S.C. 2255(a).

The same is true when a trial court mis-instructs the jury as to the law of the offense, such as in the definition of an element. Consistent with *Davis*, such errors are not constitutional. See *Gilmore* v. *Taylor*, 508 U.S. 333, 344 (1993) ("[I]nstructional errors of state law generally may not form the basis for federal habeas relief").

Section 2255(a) differs from Section 2253(c)(2), which limits appeals to *constitutional* claims and excludes non-constitutional claims such as the claim in *Davis* and Hunter's claim in this case. Such claims of statutory error are still cognizable in Section 2255 proceedings, but do not qualify for a COA. As the Seventh Circuit has explained:

> [A statutory claim] presented in an initial petition under the approach of *Davis*, and rejected by the district judge, may not be appealed. *Davis* itself shows why. Justice Rehnquist's dissent in *Davis*—where, recall, the claim was that a decision of the Supreme Court after Davis' conviction established that his acts were not crimes—argued that the petition should have been rejected because it was not based on the Constitution. The majority might have replied that any legally unwarranted conviction violates the due process clause. But the Court did not say this. Instead it emphasized that § 2255 permits relief when the sentence violates "the Constitution *or laws* of the United States" (emphasis added). The difference between § 2255 ¶ 1 and § 2253(c)(2) is clear: one authorizes relief when the sentence violates the Constitution or laws of the United States, and the second authorizes appeal when there has been a substantial showing that the sentence violates the Constitution. If the district court denies a petition based on a statutory issue, § 2253(c)(2) precludes an appeal.

*Young* v. *United States*, 124 F.3d 794, 799 (CA7 1997) (Easterbrook, J.) (internal citations omitted).

*Davis* and *Gilmore* demonstrate that a trial court's error in defining a criminal offense fails to qualify as a "constitutional" claim. If errors in defining the substantive scope of the criminal offense itself are not constitutional due-process violations, it

follows that errors in defining the legally permissible sentencing range cannot be either.

### D. The Court's Decisions In *Whalen* v. *United States* And *Hicks* v. *Oklahoma* Do Not Recognize The Constitutional Right Hunter Asserts

Hunter attempts to manufacture a "constitutional" claim out of the statutory ACCA error by invoking *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980). Petn. 15-18. The Government in *Watts* likewise relies on these two cases. Gov't *Watts* Br. 8-10. Yet neither *Whalen* nor *Hicks* gives Hunter (or Watts) a constitutional claim under the Due Process Clause.

The defendant in *Whalen* had been convicted of both rape and first-degree murder, and was sentenced to consecutive prison terms. 445 U.S. at 685. On direct review, the Court concluded that Congress had not authorized consecutive terms for those crimes. The Court held that the Double Jeopardy Clause "precludes federal courts from imposing consecutive sentences unless Congress has authorized them to do so." *Id.* at 689. The *Whalen* Court further noted that unauthorized consecutive sentences "violate[] not only the specific guarantee against double jeopardy but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Id.*

*Whalen* recognizes only that the Double Jeopardy Clause prohibits consecutive sentences when Congress intended multiple convictions to be treated as a single criminal offense. *Whalen*, 445 U.S. at 688-689, 693. In a footnote, the Court's opinion further muses about how this principle might apply in state-court proceedings. 445 U.S. at 689 n.4. The Court said that because "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States," it is

> possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.

*Id.* Hunter and the Government seize on this last sentence to support their contentions that Hunter and Watts are presenting "constitutional" claims. Petn. 15, Gov't *Watts* Br. 8 & n.2.

This dictum from a footnote in *Whalen* does not give federal and state prisoners a constitutional due-process claim whenever they complain that their sentences were unauthorized. First, such a view contradicts the Court's more recent holdings in cases such as *Lewis* and *Pulley*, *supra*, which rejected the

notion that claims that a state court had misinterpreted state sentencing law were constitutional. It also contradicts *Davis* and *Gilmore*, *supra*, which refused to endorse the same idea with respect to instructional error. Finally, *Whalen* itself reinforces that there is no general due-process right to be free from sentences that exceed the maximum penalty authorized by law. If that were the law, the *Whalen* Court would have rested its holding there, rather than plumbing the depths of Double Jeopardy doctrine.

*Hicks* is even less helpful to Hunter than *Whalen*. The defendant in *Hicks* was a recidivist offender, and the trial court had instructed his jury that it was required to impose a 40-year sentence under Oklahoma's recidivist-offender statute. 447 U.S. at 344-345. While Hicks' case was on direct review, the Oklahoma Court of Criminal Appeals declared this recidivist-offender statute unconstitutional in a different case. *Id.* at 345. Yet when Hicks' case reached that court, it affirmed his sentence. The state court reasoned that Hicks suffered no prejudice because the jury's 40-year sentence fell within the range of punishment that it could have imposed under Oklahoma's other criminal statutes.

The Court reversed Hicks' conviction on direct review, holding that "Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender

provision." *Id.* at 346 (emphasis in original). Withholding this procedural right to a jury sentence while the case was on direct review represented "an *arbitrary* disregard of the petitioner's right to liberty" and therefore a denial of due process. *Id.* (emphasis added).

The due-process violation in *Hicks* had nothing to do with a sentence that exceeded a statutory maximum. Hicks' sentence was *within* the legally permissible boundaries. The problem was that Oklahoma had denied to Hicks the *procedural* right to a jury determination of his sentence, a right that state law vested in all convicted defendants. *Id.* at 345-346. Here, Hunter makes no claim that his sentencing court forbade him a procedural right specified in federal law; he alleges only that the court erred in calculating his sentence under ACCA. Hunter cannot use *Hicks* to bootstrap this alleged statutory violation into a constitutional due-process claim.

## III. Hunter's Novel Constitutional Right Is *Teague*-Barred

*Teague* v. *Lane*, 489 U.S. 288 (1989), prohibits federal post-conviction courts from granting relief based on new rules of constitutional law. *Beard* v. *Banks*, 542 U.S. 406, 413 (2004). It also permits courts to deny COAs when the applicant fails to make a substantial showing that *Teague* would not bar collateral relief. Cf. *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring); *id.* at 341-342; *Slack*, 529 U.S. at 485;

*Hughes* v. *Dretke*, 160 Fed. Appx. 431, 434 (CA5 2006) (denying a COA as to a *Teague*-barred claim). Hunter makes no such showing, nor could he. *Teague* would bar relief even if his constitutional theory were correct, and so a COA should not issue.

Under *Teague*, the Court must determine whether Hunter advances a new rule—*i.e.*, any rule that was not "dictated by then-existing precedent" at the conclusion of his case on direct review. *Beard*, 542 U.S. at 413. The Government recognizes that Hunter's due-process claim implicates a new rule. See Gov't *Watts* Br. 8 (admitting that "this Court has not directly confronted the precise due process question implicated by this case. . . .") The question here is whether Hunter's new rule fits within one of the recognized exceptions to the *Teague* bar—is it a "watershed rule of criminal procedure" or a rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"? *Teague*, 489 U.S. at 311 (internal quotation omitted).

This scenario is similar to the fallout from the Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). *Bailey* held that "using" a firearm during a drug crime in violation of 18 U.S.C. 924(c)(1) requires the Government to prove "active employment of the firearm." *Id.* at 144. Prior to *Bailey*, some lower federal courts allowed convictions under Section 924(c)(1) for the mere presence of a firearm. *Id.* at 142. *Bailey* changed the substantive definition

of the Section 924(c)(1) offense, just as *Begay* changed the applicability of the ACCA sentencing enhancement.

Of course, Section 924(c)(1) prisoners sought post-conviction relief based on the new decision in *Bailey*. The Court held in *Bousley* v. *United States*, 523 U.S. 614 (1998), that *Bailey*'s statutory rule was not *Teague*-barred because it was a substantive decision within the "primary conduct" or "substantive" *Teague* exception. *Id.* at 620-621.

Reasoning from *Bousley*, the Government and Hunter note that *Begay* is also retroactive. Gov't *Watts* Br. 9; Petn. 9. That does not, however, resolve the *Teague* inquiry in this case. Hunter is not seeking a COA on the *statutory Begay* claim because Section 2253(c)(2) prohibits a COA for statutory error. Instead the *Teague* analysis must apply to Hunter's constitutional claim.

Again, *Bailey* is instructive. After *Bailey*, some Section 924(c)(1) convicts asserted legal-innocence claims in their post-conviction proceedings. Many of these convicts, like Hunter and Watts, asserted *constitutional* challenges to their convictions. Those convicted in a jury trial invoked *Jackson* v. *Virginia*, 443 U.S. 307 (1979), and claimed that the evidence at trial was insufficient to support their convictions in light of *Bailey*. Those that pleaded guilty attacked their pleas under *Brady* v. *United States*, 397 U.S. 742, 748 (1970), which requires valid guilty pleas to be "voluntary" and "intelligent."

In both situations, these Section 2255 movants relied on "old rules" of constitutional law that were established before their convictions became final. *Teague* presented no barrier to relief. See *Bousley*, 523 U.S. at 620 ("The only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. There is surely nothing new about this principle. . . ."); *Gray-Bey* v. *United States*, 209 F.3d 986, 989 (CA7 2000) (per curiam) (recognizing that the constitutional rule in *Jackson* is "not 'new' by any measure").

Hunter's situation is different. His only conceivable "constitutional" claim is that the *evidence supporting his ACCA enhancement* was constitutionally insufficient given *Begay*. Unlike the *Bailey* movants who raised *Jackson* claims to the evidence supporting their *convictions*, Hunter is launching a constitutional challenge to the evidence supporting *a sentencing enhancement*.

Hunter's problem is that this Court has not extended *Jackson* to those claiming to be "innocent" of a *sentencing factor*. See *Dretke* v. *Haley*, 541 U.S. 386, 395 (2004) (acknowledging that the Court has not extended *Jackson* to sufficiency-of-the-evidence claims based on sentencing errors).[5] *Haley* proves that

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[5] Prior convictions that increase a defendant's possible maximum sentence are not elements of an offense entitled to the protections of the Court's *Apprendi* line of cases. See *Haley*, 541 U.S. at 395 (citing *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)). The Court has referred to the possibility of being

(Continued on following page)

the constitutional right on which Hunter relies is *new*, *i.e.*, not "dictated by precedent"—unlike the rights asserted by Bousley and the other post-*Bailey* Section 2255 movants.

And Hunter's *Jackson*-style claim is not itself "substantive" within the meaning of the *Teague* exception because it does not redefine the elements of the crime Hunter committed. See *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004) (holding that a rule was not substantive where the rule had "nothing to do with the range of conduct a State may criminalize"); *Curtis* v. *United States*, 294 F.3d 841, 843 (CA7 2002) (Easterbrook, J.) (holding that rule of *Apprendi* is not substantive even though it deals with "quantum of evidence required for a sentence" because it does not deal with "what primary conduct is unlawful"). Hunter advances a new constitutional rule, and *Teague* bars its application on collateral review.

The Government purports to "waive" any application of *Teague* to the *Watts* case (and presumably to this case as well). Gov't *Watts* Br. 13 n.6. The Government's *post hoc* "waiver" of *Teague* (or any other procedural barrier) is of no moment because it says nothing about the soundness of the Eleventh Circuit's decision denying the COA. See *Schiro* v.

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"actually innocent" of the death penalty. *Schlup* v. *Delo*, 513 U.S. 298 (1995). But that is not "innocence" of a sentencing factor, but instead innocence of the greater offense of capital murder. *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion).

*Farley*, 510 U.S. 222, 228-229 (1994) (reaching *Teague* defense not raised below); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). It is the Eleventh Circuit's *judgment* that is under the review in this Court, and if that judgment is not in error then this Court should not summarily vacate or reverse it. The Government did not waive *Teague* below and a proper application of *Teague* supports the Eleventh Circuit's denial of a COA.

## IV. Hunter And Watts Have Procedurally Defaulted On Their Constitutional Claims And Watts Has Waived His Constitutional Claim As Well

By his own admission, Hunter failed to object to his ACCA sentencing enhancement on direct appeal. Petn. 5-6. Hunter made neither a statutory sentencing claim nor his new constitutional claim. *Id.* He has thus procedurally defaulted on both the statutory and constitutional claims under *United States* v. *Frady*, 456 U.S. 152, 167 (1982).[6] To surmount this default, Hunter must demonstrate either "cause and prejudice," or that he is factually innocent of the

[6] No court below addressed Hunter's procedural default. The procedural-default defense is waivable. *Banks* v. *Dretke*, 540 U.S. 558, 705 (2004). The Government has not waived it in this case, having presented it in opposition to Hunter's Section 2255 motion in the district court. *Amici* App. 7a-10a. And for the reasons above with respect to *Teague*, any *post hoc* "waiver" the Government may attempt in this Court says nothing about the soundness of the Eleventh Circuit's judgment.

crime of conviction. *Bousley*, 523 U.S. at 622. Unless Hunter can demonstrate that he can overcome his procedural default, a COA should not issue. See *Slack*, 529 U.S. at 484-485; *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring).

Hunter's petition does not even attempt to explain why this Court (or why the Eleventh Circuit on remand) should overlook his procedural default. He cannot satisfy the "cause and prejudice" exception because he cannot demonstrate "cause" for his default. Below he argued that his counsel was ineffective for failing to contest the ACCA enhancement on direct appeal. Petn. 6; see *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) (acknowledging that ineffective assistance of counsel can overcome a procedural default). That contention was meritless; Eleventh Circuit precedent foreclosed the *Begay* argument at the time, and counsel does not violate the Sixth Amendment by forbearing to make a losing argument. See, *e.g.*, *Whitehead* v. *Cowan*, 263 F.3d 708, 731-732 (CA7 2001). Nor does futility provide "cause" to excuse a procedural default. *Bousley*, 523 U.S. at 622-623.

Hunter's only hope is to rely on the "actual innocence" exception. To do so he must ask this Court to extend the exception to those who are "innocent" of non-capital sentencing enhancements. That is what the Court refused to do in *Haley*, as discussed earlier.

And Watts is in an even worse position than Hunter. Not only did Watts procedurally default on his constitutional claim by not raising it on direct

review, *Watts did not even present the constitutional claim in his Section 2255 proceedings or in his COA application.*

First, procedural default. Watts failed to raise his *constitutional* sentencing claim on direct review. See *Amici* App. at 41a (objecting to violent felony ACCA enhancement on statutory grounds only). And for the same reasons as Hunter, Watts cannot satisfy the cause and prejudice or "actual innocence" requirements to excuse his procedural default.

Second, waiver. An examination of Watts' Section 2255 moving papers and COA request shows that he again did *not* raise a constitutional objection to the "violent felony" ACCA classification of his prior conviction. See *Amici* App. 61a-62a (Section 2255 motion), 67a (COA request), 69a-75a (Rule 59(e) motion for reconsideration). Watts made a variety of *other* constitutional claims, including ineffective assistance of counsel and an *Apprendi* claim arising from the ACCA enhancement (*i.e.*, a request to overrule *Almendarez-Torres* and have the jury find the prior conviction facts). *Id.* at 50a-53a, 53a-61a. But Watts' argument that his prior conviction carrying a concealed weapon is not a "violent felony" under the ACCA contains no mention of the Constitution. It is a pure statutory argument. *Id.* at 61a-62a.

Watts did proceed *pro se* below (though his Section 2255 and COA filings are near verbatim copies of his counsel-drafted direct appellate brief). But this Court cannot fault the Eleventh Circuit for

denying Watts a COA where: (a) Watts failed even to mention the Constitution in connection with the "violent felony" argument and (b) the constitutional right the Government, Hunter, and Watts now assert does not exist. Accusing the Eleventh Circuit of error in not appreciating Watts' claim as constitutional would take liberal construction of *pro se* pleading to absurd lengths.

The Government does not address Watts' waiver, and implies that Watts raised a constitutional basis for the "violent felony" ACCA claim below. See Gov't *Watts* Br. 3. Instead of citing Watts' actual Section 2255 and COA moving papers, the Government cites an ambiguous sentence from the district court denial of Watts' Section 2255 motion. See *id.* (citing *Watts* Petn. App. A7). In that sentence, the district court conflated Watts' unrelated *Apprendi* due-process attack (called "ground two") with his "violent felony" argument (called "ground three"). *Watts* Petn. App. A7. But the district court recognized that these were the identical claims Watts presented on direct appeal. *Watts* Petn. App. A7-A8. All of Watts' papers on direct and collateral review divide his *Apprendi* claim from his statutory sentencing claim. And Watts never invoked a constitutional argument in support of the latter. See *Amici* App. at 41a, 61a-62a, 67a; see also *id.* at 72a-75a (re-urging "ground three" in Rule 59(e) motion and without mention of any due process basis). The Government mischaracterizes the record. Watts waived the constitutional "violent felony" claim below.

Both Hunter and Watts face significant procedural hurdles because of their defaults and failure to raise their constitutional ACCA claims at the proper time. These hurdles represent serious vehicle problems.

## V. Hunter And Watts May Be Able To Pursue Section 2241 Habeas Corpus Petitions To Get The Relief They Seek

The Court should deny the petitions in *Hunter* and *Watts*. But even without executive clemency (which should be forthcoming given the Government's plea to this Court to help these defendants), they may be able to use 28 U.S.C. 2241 to obtain relief.

Hunter and Watts may be able to avail themselves of the so-called "savings clause" of Section 2255(e), which permits a federal prisoner to petition for habeas corpus when it "appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." See *Wofford* v. *Scott*, 177 F.3d 1236, 1244-1245 (CA11 1999) ("[T]he only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent"). Their constitutional claims are *Teague*-barred, but their *Begay* statutory claims (which cannot get a COA) are not. Hunter would still need to overcome his procedural default of even the statutory claim.

The potential availability of relief under Section 2241 counsels in favor of denying the petitions in these cases.

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## CONCLUSION

For the foregoing reasons, we urge this Court to deny Hunter's petition, as well as Watts'. Alternatively, the Court should grant certiorari and order merits briefing and oral argument.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 06-22555-CIV-UNGARO**
**(CASE NO. 03-20712-CR-UNGARO)**

**HUNTER DEMARICK,**
**Petitioner,**

**vs.**

**UNITED STATES OF AMERICA,**
**Respondent.**
_____/

**UNITED STATES' RESPONSE TO DEMARICK'S PETITION PURSUANT TO 28 U.S.C. 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

COMES NOW, The United States of America, by and through the undersigned Assistant United States Attorney, and files its response to Hunter Demarick's petition pursuant to Title 28, United States Code, Section 2255. In his petition, Demarick is seeking to have his judgment and sentence vacated, arguing violation of the Speedy Trial Act, a Fifth Amendment Due Process violation, and ineffective assistance of both trial and appellate counsel. Demarick's petition should be denied.

## PROCEDURAL AND FACTUAL BACKGROUND

### I. Course of Proceedings

A federal grand jury sitting in the Southern District of Florida returned an indictment charging

petitioner Hunter Demarick with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (DE 7). The indictment also sought the forfeiture of the firearm (*id.*). Demarick entered a plea of not guilty (DE 8) and went to trial (DE 104). The jury returned a verdict of guilty (DE 81).

The probation office prepared a presentence investigation report (PSI), to which Demarick did not object. Applying the United States Sentencing Guidelines (U.S.S.G.) this court sentenced Demarick to 188 months' imprisonment, followed by five years of supervised release, imposed a fine of $3,000.00, and a special assessment of $100.00 (DE 89). Demarick filed a timely notice of appeal (DE 91). Demarick's conviction and sentence was affirmed by the Eleventh Circuit Court of Appeals on August 10, 2005 (DE 115). On October 6, 2006, Demarick filed the instant petition, which is timely filed (DE: 116). Demarick is currently incarcerated.

## II. Statement of the Facts

### A. The Offense Conduct

At approximately 6:30 p.m. on the evening of August 15, 2003, Miami-Dade Police Detective Andrew Giordani was patrolling the Carol City area of Miami-Dade County, Florida in an unmarked vehicle when he observed a black Lexus commit a traffic violation (DE 104:10-13). Detective Giordani activated his vehicle's lights and siren in order to conduct a traffic

stop (DE 104:14). From his vantage point directly behind the Lexus, Detective Giordani could see that there were two passengers in the Lexus; the passenger in the front seat was later identified as Spencer Robinson, and the passenger in the back seat was later identified as petitioner Hunter Demarick (DE 104:14-15). The driver, later identified as Sebastian Rivera, made eye contact with Detective Giordani through the rear-view mirror, but he did not stop the Lexus (DE 104:15-17).

Detective Giordani observed that Demarick was moving around a lot in the backseat and appeared to be nervous (DE 104:15). Detective Giordani then observed Robinson lean forward in the front passenger seat, as if he were placing something beneath his seat (DE 104:16).

After a couple of blocks, the Lexus pulled over (DE 104:17). Detective Giordani approached the Lexus, obtained the names of the driver and passengers, and upon checking the computer, learned there was an outstanding warrant for Demarick's arrest (DE 104:18-19, 45-46). Detective Nicole Romero arrived at the scene, and both detectives approached the Lexus (DE 104:20). Detective Giordani asked Demarick to step out of the car and advised him he was under arrest based on the warrant (DE 104:20-21). When Demarick stepped out of the car, the detectives observed an empty gun holster on the backseat of the car where Demarick had been sitting (DE 104:21-22, 28, 63).

Detective Giordani asked Robinson to step out of the car, and when Robinson complied, Detective Giordani saw the butt of a firearm emerging from beneath the right front passenger seat (DE 104:23-24). The firearm was later identified as a .380 caliber semiautomatic pistol, loaded with eight rounds of ammunition (DE 104:25, 108-09).[1] The detectives retrieved the pistol and arrested Demarick and the driver, Rivera (DE 104:26, 62).

Rivera testified at trial that he was giving Demarick a ride to the laundromat on that day (DE 104:71). Demarick noticed the police following their car and told Rivera to "hit the back streets" (DE 104:72). Rivera testified that he did not immediately stop for the police because Demarick urged him to keep driving, saying he was "dirty," that is, carrying something illegal (DE 104:72-73). Demarick, who was in the backseat, threw the gun to Robinson in the front seat and told Robinson to throw the gun out the window (DE 104:72-73). When Rivera decided to stop for the police, Robinson put the gun under his seat (DE 104:75). Demarick told Rivera to take his gun "back to the building for him" if the police arrested him (DE 104:76). After the police ordered them all out of the car, Rivera told the police that the gun belonged to Demarick (DE 104:78-79). The parties

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[1] The pistol fit inside the holster found on the backseat (DE 104:111).

stipulated that Demarick had been convicted of a felony in 2001 (DE 104:113).

**B. Sentencing**

The PSI reported Demarick's criminal history. Significantly, Demarick was convicted in 1996 for carrying a concealed firearm (PSI ¶ 21). He was again convicted in 1999 for carrying a concealed firearm (PSI ¶ 22). He was also convicted in 2001 for possession with the intent to sell or deliver cocaine (PSI ¶ 26).

Applying the 2003 United States Sentencing Guidelines (USSG), the PSI set Demarick's base offense level at 24, pursuant to USSG § 2K2.1(a)(2), the guideline applicable to violations of 18 U.S.C. § 922(g) where the defendant committed the firearm offense subsequent to two felony convictions for a crime of violence or a controlled substance offense (PSI ¶ 10). His offense level was increased by two, pursuant to USSG § 2K2.1(b)(4), because the firearm had a partially obliterated serial number (PSI ¶¶ 5, 11). Thus, his total adjusted offense level was 26 (PSI ¶ 15).

Demarick qualified as an armed career criminal, pursuant to USSG § 4B1.4, because he had at least three prior convictions for a "violent felony" or "serious drug offense" and therefore was subject to an enhanced sentence under 18 U.S.C. § 924(e) (PSI ¶ 16; see PSI ¶¶ 21, 22, 26). Thus, Demarick's total

offense level was increased to 33, pursuant to USSG § 4B1.4(b)(3)(B) (PSI ¶¶ 16, 18).

Demarick had six criminal history points (PSI ¶ 27). Because he committed the offense within two years of his release from custody, two additional criminal history points were added, pursuant to USSG § 4A1.1(e), giving him eight criminal history points and a criminal history category of IV (PSI ¶¶ 28, 29). Furthermore, because Demarick qualified as an armed career criminal, his criminal history category was IV, pursuant to USSG § 4B1.4(c)(3) (PSI ¶ 29).

Based on an offense level of 33 and a criminal history category of IV, Demarick's guideline imprisonment range was 188 to 235 months (PSI ¶ 61). The statutory minimum term of imprisonment was 15 years (180 months) and the maximum term was life, pursuant to 18 U.S.C. § 924(e) (PSI ¶ 60).

Demarick did not file any objections to the PSI. At the sentencing hearing, defense counsel stated that he had reviewed the PSI with Demarick and confirmed that he had no objections (DE 105:2). In fact, Defense counsel stated: "Your Honor, I tore this upside down, pulled it from side to side, and there was nowhere to go" (*id.*). The district court adopted the findings of the probation office and imposed a sentence of 188 months' imprisonment (DE 105:3-5).

## ARGUMENT

Demarick raises four issues in his motion to vacate: that (1) the conviction was obtained and the sentence imposed in violation of the Speedy Trial Act, (2) the court violated his Fifth Amendment rights of Due Process when it sentenced him as an armed career criminal pursuant to §4B1.4 of the U.S. Sentencing Guidelines, since a conviction for carrying a concealed firearm is not a "violent felony," (3) he received ineffective assistance of trial counsel because his attorney did not challenge the armed career criminal designation, and (4) he received ineffective assistance of appellate counsel because his attorney did not challenge the armed career criminal designaation based upon the Supreme Court's ruling in *Leocal v. Ashcroft*, 255 S.Ct. 377 (2004).

### I. Demarick's First Two Claims Are Procedurally Barred Because He Failed to Assert His Claims on Direct Appeal

In order to obtain relief under 28 U.S.C. § 2255, a prisoner serving a federal sentence must establish "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255.

As a general rule, relief is available only "for transgressions of constitutional rights and for that

narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage justice." *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981) (citation omitted). Thus, "sentences imposed within the statutory limits are insulated from section 2255 review." *Fernandez v. United States*, 941 F.2d 1488, 1494 (11th Cir. 1991).

Demarick's conviction and sentence were affirmed by the Eleventh Circuit Court of Appeals on August 10, 2005. He did not seek a *writ of certiorari* to the United States Supreme Court. As such, he cannot now raise claims involving an alleged violation of the Speedy Trial Act or an alleged Fifth Amendment Due Process violation which caused sentencing errors, absent a showing of "cause" for procedurally defaulting such claims and "actual prejudice" from his failure to raise these issues on appeal. *Belford v. United States*, 975 F2d 310 (7th Cir. 1992).

Claims not raised in a defendant's original criminal proceeding, whether at the district court level or on appeal, are subject to dismissal when they are raised for the first time in a collateral proceeding. *United States v. Frady*, 456 U.S. 152, 167-69 (1982); *Parks v. United States*, 832 F.2d 1244, 1245-46 (11th Cir. 1987). Once the government sets forth the circumstances constituting a defendant's procedural default, it becomes the defendant's burden to disprove his default and to establish "cause and prejudice" for the failure to previously assert his claims. *McClesky v. Zant*, 499 U.S. 567, 493-94. Where a defendant

makes no showing of cause and prejudice regarding his failure to raise issues on direct appeal that are raised for the first time in a § 2255 petition, summary dismissal of those claims is warranted. *Parks*, 832 F.2d at 1246. Demarick's habeas petition inexplicably states that he has "established the cause and prejudice test under **Strickland**" (DE: 116).

"'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot be fairly attributed to h[im]." *Coleman v. Thompson* 501 U.S. 722, 753 (1991). "Objective factors that constitute cause," include "interference by officials," *McClesky*, 111 S.Ct. at 1470, or "a showing that the factual or legal basis for a claim was not reasonably available to counsel," *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish prejudice, a petitioner must demonstrate prejudice so substantial that it undermines the integrity of the entire proceeding. *Frady*, 456 U.S. at 152. Moreover, if a petitioner cannot show cause for his failure to raise his claims previously, the court need not consider whether he was prejudiced by his procedural default. *See Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993).

Demarick's explanation of why he failed to raise the issues raised in the instant Petition on direct appeal, rest with his ineffective assistance of appellate counsel allegations. His petition is silent as to why these issues were not raised at the district court level. As such, his first two claims fail the "cause" prong of the analysis. Additionally, all of the issues

raised by Demarick, if addressed on the merits, will fail. Demarick cannot, therefore, demonstrate that he will suffer any prejudice if his claims are procedurally barred from being addressed by this court. Accordingly, Demarick does not, and cannot, meet his burden of establishing cause and prejudice for his failure to raise these claims in a timely fashion. Thus, Demarick is procedurally barred from raising these issues in the instant § 2255 Petition, and the merits of such claims should not be considered by this court. *Macklin v. Singletary*, 24 F.3d 1307 (11th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995). These claims should be summarily dismissed.

## II. Notwithstanding the Fact that Demarick's First Two Claims are Procedurally Barred, Such Claims are Nevertheless Without Merit and Should be Dismissed

For the following reasons, Demarick's claims do not merit relief, and his petition should be denied without a hearing. *See Machibroda v. United States*, 368 U.S. 487, 495 (1962); *Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied*, 502 U.S. 1105 (1992).

### A. The Conviction and Sentence Were not Obtained in Violation of the Speedy Trial Act

Demarick contends that the district court erred in conducting the jury trial in violation of the Speedy

Trial Act (DE 116:8). Demarick argues that the court failed to adequately set forth its reasons in granting "ends of justice" continuances (*id*).

The Speedy Trial Act requires that the trial of an indicted defendant commence within 70 days from the later of either the filing date of the indictment or the date on which the defendant first appears before the court in which his case is pending. 18 U.S.C. § 3161(c)(1); *United States v. Twitty*, 107 F.3d 1482, 1487 (11th Cir. 1997).[2] Certain periods are excluded from the 70-day limit, including any period of delay resulting from other proceedings concerning the defendant. *United States v. Williams*, 197 F.3d 1091, 1093 (11th Cir. 1999) (citing 18 U.S.C. § 3161(h)(1)). While more than 70-days elapsed between Demarick's arraignment and his trial, there was no violation of the Speedy Trial Act (STA) because this court correctly excluded time as provided by the STA.

Demarick's arraignment was held on September 2, 2003 (DE 8). Because the date of arraignment is not counted as one of the 70 days for purposes of 18 U.S.C. § 3161(c)(1), the Speedy Trial Act count did not

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[2] Title 18 U.S.C. § 3161(c)(1) provides as follows:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

begin until the following day, September 3, 2003. *See United States v. Severdija*, 723 F.2d 791, 793 (11th Cir. 1984) (day that triggers speedy trial limits excluded from the 70-day limit). The trial of this matter was continued on seven occasions. The time was excludable under 18 U.S.C. § 3161(h)(1)(F).[3] Specifically, Demarick claims that this court erred in excluding time after granting the "ends of justice" continuances that Demarick requested (DE 48, 62). Demarick claims that this court's orders were insufficient because they failed to set forth the reasons for its "ends-of-justice" finding (DE 116:8).

Section 3161(h)(8) excludes time when the trial court makes specific findings, whether orally or in writing, of its reasons for finding that the ends of justice served by granting a continuance, outweigh the best interests of the public and the defendant in a speedy trial. The court is to make its findings at the time it grants the continuance. *United States v. Elkins*, 795 F.2d 919, 924 (11th Cir. 1986); *United States v. Sarro*, 742 F.2d 1286, 1300 (11th Cir. 1984). However, the court is not required "to enunciate its findings when it grants the continuance so long as there is sufficient evidence in the record indicating that it considered the factors identified in the statute when it granted the continuance." *United States v. Vasser*, 916 F.2d 624, 626 (11th Cir. 1990). *See also,*

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[3] Section 3161(h)(1)(F) provided that "delay resulting from any pretrial motion" is excludable.

*United States v. Mathis*, 96 F.3d 1577, 1580 (11th Cir. 1996)(The court need not enunciate its findings where the reasons are evident from the record). In *Vasser*, the Eleventh Circuit Court of Appeals found that because the record, *inter alia*, showed that the defense needed more time to prepare its case, there was no abuse of discretion in finding that the ends of justice would be served by granting a continuance. In *United States v. McKay*, 30 F.3d 1418, 1419-20 (11th Cir. 1994), the Eleventh Circuit Court reviewed the record and found that the ends of justice had been served where the defense stated that it had yet to receive certain discovery and failed to state an objection to the trial date. Finally, in *United States v. Henry*, 698 F.2d 1172, 1173-74 (11th Cir. 1983), the Court of Appeals found no error in the district court's decision to grant the defendant a continuance based upon the request of defense counsel. The Court stated that a trial judge "must be given broad discretion in attempting to comply with the mandates of the Speedy Trial Act and the exclusions thereto." *Id.*

In this case, Demarick complains that the "granting of the last continuance on February 13, 2004, failed to protect movant's speedy trial right simply because trial did not begin until June 7, 2004, some 114 days late" (DE 6:13). Demarick fails, however, to mention several key points. The fourth continuance granted on January 16, 2004, was based upon the defendant's Motion for Continuance of Trial filed on January 6, 2004 (DE 51, 48). In addition, the seventh, and final continuance, was granted on April

8, 2004, once again based upon the defendant's Motion for Continuance of Trial filed on March 25, 2004 (DE 62, 63). Moreover, the defendant filed an Emergency Motion to Continue Trial or in the Alternative to Exclude Witness on June 4, 2004 (DE 74). Demarick's argument that the court's orders granting continuances did not satisfy the Speedy Trial Act and thus his conviction and sentence should be vacated is meritless.

On March 23, 2004, Demarick filed a Motion for a Continuance of Trial requesting more time in order to "adequately prepare this matter for trial" (DE 62). The motion referenced the fact that Demarick's present counsel had received the file from the Federal Public Defender and needed to review a number of interesting and complex issues (*id*). Demarick's motion specifically requested a 30-day continuance (*id*). Demarick's motion also stated that defense counsel certified that the motion was "made in good faith, the best interest of justice, and not for any purpose of delay" (*id*). Significantly, Demarick's motion indicated that "the defendant is aware of this request and waives the speedy trial time" (*id*). Demarick did not object to the time being excludable and does not now claim that the court erred in granting his motion. He only claims that the court made insufficient findings. His claim should be rejected as the record, including the defendant's own motions as well as his change of counsel, sufficiently support the court's conclusion that the ends of justice were served.

### B. The Application Of The United States Sentencing Guidelines Armed Career Criminal Designation Based Upon Prior Convictions Pursuant to U.S.S.G. § 4B1.4, Did Not Violate His Fifth Amendment Rights

Demarick argues that his Fifth Amendment Due Process rights were violated when this court sentenced him as an armed career criminal. He cites *Leocal v. Ashcroft*, 255 S.Ct. 377 (2004) in support of such claim.[4]

Section 4B1.4 of the U.S. Sentencing Guidelines provides that a defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. 924(e) is an armed career criminal. This provision outlines the offense level for an armed career criminal and the corresponding criminal history category. In the case at bar, Demarick's base offense level was determined to be 33 with a criminal history category of IV. Notably, the Application Notes provide that "The terms "violent felony" and "serious drug offense," are defined in 18 U.S.C. 924(e)(2)." Demarick was convicted in 1996 for carrying a concealed firearm (PSI ¶ 21). He was again convicted in 1999 for carrying a concealed firearm (PSI ¶ 22). He was

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[4] *Leocal v. Ashcroft*, 255 S.Ct. 377 (2004) held that alien's conviction for driving under the influence of alcohol (DUI) and causing serious bodily injury in an accident, in violation of Florida law, was not a "crime of violence," and therefore, was not an "aggravated felony" warranting deportation.

also convicted in 2001 for possession with the intent to sell or deliver cocaine (PSI ¶ 26).

In this case, Demarick had the opportunity to challenge the accuracy and legitimacy of his prior convictions, but he did not do so. In fact, he filed no objections to the PSI and did not argue this issue on direct appeal. He now claims that the armed career criminal designation was unconstitutional under the Fifth Amendment because a conviction for carrying a concealed firearm is not a "violent felony" under §4B1.4. Contrary to his assertion, however, not only is the law clear that carrying a concealed weapon falls within the definition of a violent felony under 18 U.S.C. 924(e),[5] but the provisions of §2K2.1 also provide that a defendant, such as Demarick, who is convicted of unlawful possession of a firearm by a felon and has one or more prior felony convictions for a crime of violence or a controlled substance offense; and is sentenced under the provisions of 18 U.S.C. 924(e) warrant the application of §4B1.4 armed career criminal guidelines.

## III. Demarick Was Not Denied Effective Counsel

Demarick argues he was denied effective assistance of counsel because both his trial and appellate attorneys failed to argue that the conviction

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[5] *See United States v. Hall*, 77 F.3d 398 (11th Cir. 1996).

and sentence violated his Sixth Amendment Right to a Speedy Trial. An essential component of an ineffective assistance claim is that there be prejudice. Since there was no violation of Demarick's right to a Speedy Trial, there was no prejudice and no violation of the Sixth Amendment right to receive effective assistance of counsel. *Puentes-Germes v. United States*, 2005 WL 503147 (S.D.N.Y. 2005). Demarick complains that this court erred in excluding time after granting the "ends of justice" continuances that Demarick requested (DE 48, 62). Demarick contends that this court's orders were insufficient because they failed to set forth the reasons for its "ends-of-justice" finding (DE 116:8).

As stated above, it is clear that the statutory time-limits pursuant to the Speedy Trial Act were complied with correctly. Demarick has shown no violation of the Speedy Trial Act following his arraignment on September 2, 2003. Demarick did not object to the time being excludable and does not now claim that the court erred in granting his motion. He only claims that the court made insufficient findings. His claim should be rejected as the record, including the defendant's own motions as well as his change of counsel, sufficiently support the court's conclusion that the ends of justice were served. Moreover, there is no basis to support a claim that there was a violation of his rights under Fifth Amendment Due Process Clause due to his designation as an armed career criminal pursuant to U.S.S.G. §4B1.4.

Although Demarick's counsel must be able to present "an intelligent and knowledgeable defense," *Carawav v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970), he is not obliged to pursue avenues clearly of no evidentiary value. *See, Jones v. Estelle*, 632 F.2d 490 (5th Cir. 1980), *cert. denied*, 451 U.S. 916 (1981); *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980); *Mavs v. Estelle*, 610 F.2d 296 (5th Cir. 1980). Furthermore, because "counsel is not ineffective for failing to raise claims "reasonably considered to be without merit,'" counsel was not ineffective in this case. *United States v. Nyhuis*, supra, 211 F.3d 1340, 1344 (11th Cir. 2000), *quoting Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). There is virtually nothing in this record to support that there was a reasonable probability that but for his counsels' alleged errors in not challenging the armed career criminal designation or arguing that the conviction and sentence violated his Sixth Amendment Right to a Speedy Trial that the result of the proceeding would have been any different. The statutory minimum term of imprisonment was 15 years (180 months) and the maximum term was life, pursuant to 18 U.S.C. § 924(c) (PSI ¶ 60). And, an attorney is under no duty to raise issues which have no merit. *See Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990). Hence, Demarick's ineffective assistance of counsel claims fail.

## CONCLUSION

WHEREFORE, the United States requests that this Court deny the Petition.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2006, I electronically filed the foregoing document ***UNITED STATES' RESPONSE TO DEMARICK'S PETITION PURSUANT TO 28 U.S.C. 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE*** with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served today by **U.S. Mail** for those counsel and/or parties who are not authorized to receive or did not receive

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2005 WL 4664919 (C.A.11)

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
**Darian WATTS**, Defendant-Appellant.
No. 05-12248-EE.
August, 2005.

On Appeal from the United States District Court
for the Middle District of Florida Tampa Division
District Court Case No.: 8:04-CR-314-T-24MAP
Hon. Susan C. Bucklew, United States District Judge

Initial Brief of Appellant Darian Watts

Timothy J. Fitzgerald, Esq., 708 E. Jackson Street, Tampa, FL 33602, (813) 228-0095; Fax (813) 224-0269, Counsel for Appellant.

## *STATEMENT REGARDING ORAL ARGUMENT*

Oral argument is requested, as the issues in this case have not been recently decided authoritatively and oral argument may assist the decisional process.

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## *STATEMENT OF JURISDICTION*

This Court's jurisdiction is provided by 28 U.S.C. § 1291 and by 18 U.S.C. § 3742(a)(1).

## *STATEMENT OF THE ISSUES*

I.

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT AS AN ARMED CAREER CRIMINAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT A CONVICTION FOR CARRYING A CONCEALED WEAPON QUALIFIED AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT

III.

WHETHER THE TRIAL COURT ERRED IN FINDING THE DEFENDANT TO BE AN ARMED CAREER CRIMINAL WITHOUT FINDING THAT

## THE PREDICATE CONVICTIONS OCCURRED ON OCCASIONS DIFFERENT FROM ONE ANOTHER

### *STATEMENT OF THE CASE*

I. *Course of the Proceedings and Disposition in the Court Below*

Darian Antwan Watts is currently incarcerated, serving a term of imprisonment of 210 months. Doc. 64.

On July 21, 2004, a federal grand jury indicted a single defendant, Darian Watts. Doc. 13. The sole count of the indictment alleged that on May 23, 2004 Watts possessed a firearm after previously being convicted of a felony, in violation of Title 18 U.S.C. §§ 922(g)(1) and 924(e). Doc. 13. Watts entered a plea of not guilty on August 16, 2004. Doc. 18.

The case proceeded to trial on January 10, 2005. Doc. 77. After the government rested its case, Watts moved pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal. Doc. 77. Among other grounds, Watts moved for a judgment of acquittal based on the government's failure to prove that he had previously been convicted of three violent felonies which occurred on separate occasions, in violation of Title 18 United States Code § 924(e). Doc. 78 – Pg. 4. This motion was denied, as was Watts' renewed motion for judgment of acquittal following the conclusion of his case-in-chief. Doc. 78 – Pgs. 6, 13. On January 11, 2005, the jury found Watts guilty of possessing a firearm as a convicted felon. Doc. 52.

On January 21, 2005 Watts filed a renewed motion for a Rule 29 judgment of acquittal, again alleging that the government failed to prove to the jury that he had previously been convicted of three prior violent felonies. Doc. 58. The district court denied the renewed motion for a Rule 29 judgment of acquittal. Doc. 60. Watts was sentenced on April 15, 2005. Doc. 63.

Prior to his sentencing hearing Watts objected to the Presentence Report (PSR), which found him to be an armed career criminal, and he requested a jury trial on the issue. PSR Addendum. The district court, over Watts' objections and denying his request for a jury trial, found Watts to be an armed career criminal pursuant to Title 18 U.S.C. § 924(e). Doc. 81 – Pgs. 22 and 23. The court sentenced Watts as an armed career criminal to 210 months in prison. Doc. 64. Watts filed a timely notice of appeal, and this appeal follows. Doc. 66.

## II. *Statement of the Facts*

Darian Watts was charged in a one count indictment alleging that, on or about May 23, 2004, he possessed a firearm after being convicted of a felony, in violation of Title 18 U.S.C. §§ 922(g) and 924(e). Doc. 13. The indictment alleged that Watts had previously been convicted of the following:

Possession of cocaine and carrying a concealed firearm, felony crimes each punishable by a term of

imprisonment exceeding one year, Case No. 94-CF-002148 on or about May 23, 1995, in the Circuit Court 13th Judicial District, in and for Hillsborough County, Florida;

Robbery, a felony crime punishable by a term of imprisonment exceeding one year, Case No. 94-CF-016767, on or about November 26, 1997(sic),[1] in the Circuit Court 13th Judicial District, in and for Hillsborough County, Florida; and

Robbery, a felony crime punishable by a term of imprisonment exceeding one year, Case No. 95-CF-000103, on or about May 23, 1997(sic),[2] in the Circuit Court 13th Judicial District, in and for Hillsborough County, Florida.

The indictment did not allege these convictions were violent felonies or that they were committed on separate occasions. Doc. 13. However, the indictment did allege that Watts violated Title 18 U.S.C. § 924(e). Doc. 13. Watts entered a plea of not guilty on August 16, 2005. Doc. 18.

The case proceeded to trial on January 10, 2005. Doc. 77. Prior to the trial the government requested Watts stipulate that he was a convicted felon. The defendant so stipulated, but Watts did not stipulate that he had previously been convicted of three violent

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[1] The date was actually May 23, 1995.

[2] The date was actually May 23, 1995.

felonies as proscribed in Title 18 United States Code § 924(e). Doc. 57.

After the government rested its case, Watts moved for a judgment of acquittal pursuant to Fed. R. Crim P. 29. Doc. 77 – Pg. 298.; Doc. 78 – Pg. 4. As a basis for the motion for judgment of acquittal, Watts alleged, among other things, that the government failed to prove he had previously been convicted of three qualifying violent felonies under Title 18 U.S.C. § 924(e). Doc. 78 – Pg. 4. At trial, the government presented no evidence of Watts' prior convictions other than to introduce his stipulation that he was a convicted felon at the time of the offense. Doc. 77 – Pg. 57. The court nonetheless denied Watts' motion for judgment of acquittal at the close of the government's case-in-chief. Doc. 78 – Pg. 6.

Watts rested his case without presenting any evidence. Doc. 78 – Pg. 14. Watts then renewed his motion for a Rule 29 judgment of acquittal, again alleging the government failed to prove he had previously been convicted of three violent felonies and, as a result, requested the court to dismiss the title 18 U.S.C. § 924(e) portion of the indictment. Doc. 78 – Pg. 13. The court again denied the motion for the judgment of acquittal. Doc. 78 – Pg. 13. The jury returned a verdict of guilty. Doc. 52. On January 21, 2005, Watts filed a renewed motion for judgment of acquittal or, alternatively motion for a new trial. Doc. 58. The post-trial motion for judgment of acquittal renewed Watts' request for a judgment of acquittal as to the title 18 U.S.C. § 924(e) portion of the

indictment. Doc. 58 The court denied the motion for judgment of acquittal and motion for new trial. Doc. 60.

Watts was sentenced on April 15, 2005. Doc. 81. Prior to his sentencing Watts objected to the Presentence Report. PSR Addendum. Specifically, Watts objected to his classification as an armed career criminal, asserting both his Sixth Amendment right to trial on that issue and his Fifth Amendment right to remain silent as to the felony convictions in his Presentence Report. Doc. 81 – Pg. 23, PSR Addendum. Watts argued that the Presentence Report classification as an armed career criminal was incorrect. Doc. 81 – Pg. 23. The classification changed the statutory maximum from 10 years in prison, to life with a mandatory minimum of 15 years in prison. The guideline range was increased by this classification from offense level 24 to offense level 33. Presentence Report (hereinafter PSR). To determine if Watts was an armed career criminal, the district court examined records provided by the probation office. Doc. 81 – Pg. 22. The Court first reviewed an information[3] with case number 94-2148, charging a Darian Watts with carrying a concealed firearm on February 16, 1994, and then inspected a judgment indicating that a Darian Watts pled guilty, and was so adjudicated, of carrying a concealed firearm the same

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[3] An information is a charging document in the Florida State system.

case. Doc. 81 – Pg. 22. The district court then reviewed an information alleging a Darion Watts committed a robbery in case number 94-16767, and a judgment in the same case that indicated a Darion Watts pled guilty and was convicted of robbery on May 23, 1995. Doc. 81 – Pg. 22. Finally, the court reviewed information number 95-103, which alleged a Darion Watts committed a robbery on November 30, 1995 and an accompanying judgment that indicated a Darion Watts pled guilty to a robbery that same case on May 23, 1995. Doc. 81 – Pg. 23. The court then concluded that the defendant had three prior qualifying offenses under the Armed Career Criminal Act. Doc. 8 – Pg.23. The Court then asked Watts if he disputed the finding that he had three qualifying convictions. Doc. 81 – Pg. 23. The court and defense counsel had the following colloquy:

> THE COURT: . . . Mr. Fitzgerald, did you want me just to go through and verify that or did you have really some dispute with any of it?
>
> MR. FITZGERALD: Judge, I'm trying to maintain his plea of not guilty to these offenses and maintain his right and request for a jury trial to those offenses, and, in light of the Shepard case, make sure that the Court complies at least with what Shepard requires –
>
> THE COURT: Okay.
>
> MR. FITZGERALD: – in the finding. We don't – we – while we're asking you to find

those specific things, we do not waive our right to a jury trial that we believe we have.

THE COURT: Okay.

As to the convictions used by the sentencing Court to determine the defendant to be an armed career criminal, the defendant at all times asserted his Sixth Amendment right to a jury trial to dispute the nature of any convictions, and whether they qualified as violent felonies under Title 18 U.S.C. § 924(e). Doc. 81 – Pg. 23. Watts' Objections to PSR. Watts contended that his classification as an armed career criminal was inappropriate and his that his Sentencing Guidelines enhancement under U.S.S.G. § 4B1.4 was improper. PSR Addendum; Watts' Objections to PSR. Watts argued that he should have been sentenced to a total offense level 26 and a guideline range of 92-115 months in prison. Watts' Objections to PSR.

Over Watts' objection to being classified as an armed career criminal and his request for a jury trial on the issue, the court found Watts to be an armed career criminal, and sentenced him accordingly. Doc. 81 – Pgs. 23, 24.

III. *Standard of Review*

The defendant raises a constitutional objection to his sentence which is reviewed *de novo. United States v. Miles, 290 F. 3d, 1341 (11th Cir. 2002).*

The district court's factual findings are reviewed for clear error and its application of the Sentencing Guidelines to those facts are reviewed *de novo.* Whether two crimes constitute a single criminal episode or two separate felonies for the purpose of § 924(e) is an issue of law which is reviewed *de novo. United States v. Miles,* 290 F.3d 1341 (11th cir. 2002) *citing to United States v. Richardson,* 230 F. 3d 1297 (11th Cir. 2000), *cert. denied,* 532 U.S. 983, 121 S.Ct. 1626, 149 L.Ed. 488 (2001).

## *SUMMARY OF THE ARGUMENT*

The district court erred, first, by sentencing Mr. Watts as an armed career criminal under the ACCA. In so doing, the court violated Mr. Watts' Sixth Amendment right as established in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). This case presents the issue *of whether Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219 (1998), continues to survive in light of *Apprendi* and its progeny, including *Shepard v. United States, 544 U.S. 13, 161 L.Ed. 2d 205, 125 S. Ct. 1254 (2005).* Mr. Watts contends that the lone exception to the *Apprendi* rule – namely the facts relating to the existence and nature of prior convictions – is no longer valid, and that these facts like all other sentence-enhancing facts must be both charged and proved to the jury beyond a reasonable doubt. Watts further contends that the nature of his convictions, and whether they occurred on occasions different from one another, must be charged and proven to a jury beyond a reasonable doubt.

Acknowledging adverse case authority, Mr. Watts also submits that the district court erred in finding that the offense of carrying a concealed weapon is a violent felony for purposes of 18 U.S.C. § 924(e).

Finally, Mr. Watts contends that the district court erred by sentencing him as an armed career criminal without determining that the three predicate offenses on which the court relied in fact occurred on three separate occasions.

## ARGUMENT

### I.

### THE TRIAL COURT ERRED BY SENTENCING APPELLANT AS AN ARMED CAREER CRIMINAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS.

Mr. Watts was convicted following a jury trial of possession of a firearm by a convicted felon. The sole count in the indictment alleged a violation of both 18 U.S.C. § 922(g) (possession fo a firearm by a convicted felon), and a violation of 18 U.S.C. § 924(e), the Armed Career Criminal Act. The Armed Career Criminal Act (hereinafter referred to as the ACCA), 18 U.S.C. § 924(e)(1), provides a fifteen year mandatory prison sentence for a person who violates § 922(g)(1) (possession of a firearm by a convicted felon), and who has three or more convictions for a violent felony, a serious drug offense, or both. The statute expressly requires that the prior offenses

must have been committed on occasions different from one another.

Under 18 U.S.C. § 924(e)(2)(B), a "violent felony" is an offense that: (i) has as an element the use, attempted use, or threatened use of physical force; or (ii) is burglary, arson, extortion, or other offenses involving conduct that presents a serious risk of physical injury to another. Under 18 U.S.C. § 924(e)(2)(A)(ii), a "serious drug offense[s]" defined by the ACCA as certain drug offenses that are punishable by maximum term of imprisonment of ten years or more. Additionally, the ACCA cannot be applied in this case because the jury merely found that Mr. Watts possessed a firearm and was a convicted felon. The maximum penalty based upon the specific jury findings in the case is ten years. *See* 18 U.S.C. § 922(g)(1).

In *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 348 (2000), the United States Supreme Court held that, "Other than the fact of a prior conviction, any fact which increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 490; 120 S.Ct. At 2363-64. In *Apprendi,* the Court additionally found that it was unconstitutional to remove from the jury's consideration the assessment of any facts that increase the prescribed range of penalties to which a criminal defendant is exposed. 530 U.S. at 491-92; 120 S.Ct. At 2363. The issue before the Court in *Apprendi* involved the constitutionality of New Jersey criminal statutes that

permitted an increased sentence if the offense was determined to be, in effect, a hate crime. *Id.*

Prior to finding the New Jersey statute unconstitutional in *Apprendi,* the Supreme Court *decided Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219 (1998). In that case, the Court held that a prior conviction need not be alleged in the indictment in order to trigger an enhanced statutory maximum under 8 U.S.C. § 1326 for illegally reentering the United States after deportation. In so ruling, the Court in *Almendarez-Torres* relied upon a principle seemingly rejected in *Apprendi:* "[An indictment] need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." 523 U.S. at 229, 118 S. Ct. at 1223. The premise *of Almendarez-Torres,* therefore, was not that prior convictions are different from other facts that are essential to punishment, but that any factual finding, that only impacts the sentence is not required to be alleged in the indictment and found by the jury beyond a reasonable doubt. This premise did not survive *Apprendi. See Blakely,* 124 S. Ct at 2253 ("[A]s *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment") (emphasis in original).

Of course, in order to find the New Jersey statute unconstitutional *in Apprendi,* it was not necessary to overrule *Almendarez-Torres,* because the facts relevant to the sentencing enhancement were not merely prior convictions. Rather than doing so in *dicta,* the

*Apprendi* Court excepted the fact of a prior conviction from its express holding. *See Apprendi* 530 U.S. at 490, 120 S. Ct. at 2362-2363. Although the *Apprendi* Court did not *overrule Almendarez-Torres,* it signaled its inevitable demise, stating: "[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that our reasoning today should apply if the recidivist issue were contested." *Apprendi,* 530 U.S. at 489-490, 120 S. Ct. at 2362. Indeed, *Apprendi made* no secret that it was retreating from the broader constitutional implications of *Almendarez-Torres,* describing it as "at best as an exceptional departure from the historic practice we have described." *Apprendi,* 530 U.S. at 487, 120 S. Ct. At 2361. *Apprendi* thus evidently recognized that *Almendarez-Torres* did not fit comfortably within its clarified understanding of the Sixth Amendment.

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Since *Apprendi* was decided, the Supreme Court has never tested the *Almendarez-Torres* holding in a

case, such as Mr. Watts', which the constitutionality of the sentence that the government seeks squarely depends on the validity, after *Apprendi,* of the exception.

Mr. Watts suggests that exempting recidivism findings from the *Apprendi* rule is not supported by logic. Indeed, it is supported only by *Almendarez-Torres* itself, a decision whose premise has been undermined by subsequent cases. *See Monge v. California,* 524 U.S. 721, 741, 118 S. Ct. 2246, 2257 (1998) (Scalia, J. dissenting) (describing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").

Any continued reliance by the government *on Almendarez-Torres* was further undermined by the Supreme Court's recent decision in *Shepard v. United States, 544 U.S. ___, 161 L.Ed. 2d 205, 125 S. Ct.* 1254 (2005) (observing that in light *of Apprendi, Almendarez-Torres* does not authorize the sentencing court to resolve disputed facts as to whether a prior conviction is a qualifying prior for purposes of the Armed Career Criminal Act). *See Shepard,* 125 S. Ct. at 1262-1263. Concurring *in Shepard,* Justice Thomas acknowledged that "a majority of this Court now recognizes that *Almendarez-Torres* was wrongfully decided." *Id* at 1464 (Thomas, J., concurring) Indeed, Justice O'Connor, whose dissent in *Blakely v. Washington,* 124 S. Ct. 2531, 2558-2560 (2004) foreshadowed the demise of the mandatory Sentencing Guidelines, recognized that the majority in *Shepard*

*had* engrafted, for the first time, *an Apprendi* requirement on recidivist enhancements:

> [I]t is one thing for the majority to apply its *Apprendi* rule within its own bounds, and quite another to extend the rule into new territory that *Apprendi* and succeeding cases had expressly and consistently disclaimed. Yet today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations, which until now have been safe from such formalism.

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Obviously, Mr. Watts recognizes that this Court lacks the authority to overrule *Almendarez-Torres,* regardless of how inevitable it is that the Supreme Court will do so at the first opportunity. *See United States v. Thomas,* 242 F.3d 1028, 1034-1035 (11th Cir. 2001) (refusing to reconsider the holding in *Almendarez-Torres* in light of the "very basic fact that we cannot overrule Supreme Court decisions"). However, the foregoing cases make clear that the reasoning of *Almendarez-Torres* has been "gravely wounded" by subsequent decisions of the Supreme Court. Therefore, this Court should not strain to expand the reach of *Almendarez-Torres* beyond its express holding. *Cf. Jefferson County v. Acker,* 210 F. 3d 1317, 1320 (11th Cir. 2001) ("[I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us – if it cannot be said that decision 'directly controls' our case – then, we are free to apply the reasoning in later Supreme Court

decisions to the case at hand. We are not obligated to extend by even a micron a Supreme Court decision which that Court itself has discredited.").

In *Almendarez-Torres,* the defendant admitted to the existence of the prior convictions during his plea colloquy. *See Almendarez-Torres,* 523 U.S. at 227, 118 S. Ct. at 1222 ("At a hearing, before the District Court accepted his plea, Almendarez-Torres admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies."). Therefore, *Almendarez-Torres* was limited to the Fifth Amendment rights to indictment, due process, and notice, and did not address the Sixth Amendment right to a jury trial. *Id. See also Apprendi,* 530 U.S. at 488, 120 S. Ct. at 2361 (noting that, because *Almendarez-Torres* had admitted the earlier aggravated felony convictions during plea colloquy, no question concerning the right to jury trial or standard of proof would apply).

Unlike in *Almendarez-Torres,* Mr. Watts *did not* stipulate to anything beyond the mere fact that he was a convicted felon. Therefore, these alleged prior convictions were not removed from the facts that were required under *Apprendi* to be proven to a jury beyond a reasonable doubt. Therefore, even if the offenses alleged in the indictment by the government had been sufficient to trigger the ACCA, the sentencing court could still not increase Mr. Watts' 10 year maximum sentence and increase the guideline

range beyond the statutory maximum established by the jury's verdict, based upon judicial fact-finding, without violating his Sixth Amendment right to a jury trial. Mr. Watts has a Sixth Amendment right to have a jury determine if he has three prior convictions that qualify as "violent felonies" under the ACCA and if those prior convictions occurred on occasions different from one another.

While the Eleventh Circuit has held *Almendarez-Torres* to remain law even *post-Shepard,* its rationale still allows Watts relief. In *United States v. Orduno-Mireles,* 405 F. 3d 960, 962 (11th Cir. 2005) the court held that every fact other than a prior conviction, which increases the statutory maximum must be proven to a jury because a prior conviction must itself be established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. However, Watts sentence was not enhanced merely by prior convictions. It was enhanced by a judicial determination that the prior convictions occurred on "occasions different from one another." Watts has a right for a jury to determine if his prior convictions occurred on "occasions different from one another." There has not been an establishment that the procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees for this element have been met. Watts is entitled to a jury trial on the existence of his prior convictions, the nature of his prior convictions, and whether they occurred on occasions different from one another.

## II

## THE TRIAL COURT ERRED IN FINDING THAT A CONVICTION FOR CARRYING A CONCEALED WEAPON QUALIFIED AS A VIOLENT FELONY UNDER ARMED CAREER CRIMINAL ACT

The district court found Watts to be ar armed career criminal in part by finding that a conviction for carrying a concealed firearm was a violent felony under Title 18 U.S.C. § 924(e). Doc. 81 – Pg. 22. Watts objected to this finding, arguing that carrying a concealed firearem was not a violent felony. *Id.* at 23. The court overruled Watts' objection. *Id.* at 23. This Court has previously held that carrying a concealed firearm is a violent felony under § 924(e) and U.S.S.G. § 4B1.4. *United States v. Hall,* 77 F.3d 398 (11th Cir. 1996). However, the defendant contends that merely carrying a concealed weapon is not a violent felony, as it is not conduct that poses a serious potential risk of physical injury. Counsel raises this argument for the record, acknowledging the adverse authority above.

## III.

## THE TRIAL COURT ERRED IN FINDING THE DEFENDANT TO BE AN ARMED CAREER CRIMINAL ACT WITHOUT FINDING THAT THE PREDICATE CONVICTIONS OCCURRED ON OCCASIONS DIFFERENT FROM ONE ANOTHER

The defendant timely objected to his classification as an armed career criminal. PSR Addendum.

The defendant maintained at sentencing that he was not an armed career criminal, asserted his Fifth Amendment right to remain silent and his Sixth Amendment right to a jury trial on the issue of whether he was subject to the ACCA and the Guideline enhancement of an armed career criminal under U.S.S.G. § 4B1.4. Doc.81 – Pg. 23. Overruling the objections, the court found the defendant to be an armed career criminal. Doc. 81 – Pg. 24. The defendant maintains that the court never made a factual determination that the three predicate offenses used to qualify the defendant under the ACCA were "committed on occasions different from one another" as required by § 924(e)(1). The district court found that case number 94-2148, carrying a concealed weapon, occurred on February 16, 2004. Doc. 81 – Pg.22 The court further found that case number 95-103 occurred on or about the 30th day of November 1994. *Id.* at 23. The district court made no finding of when case number 94-16767 occurred. Doc. 81.

Section 924(e) provides that any person, who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or serious drug offense, or both, committed on occasions different from one another, shall be imprisoned for not less than 15 years. 18 U.S.C. § 924(e)(1). Once the government has shown the defendant has three prior qualifying offenses committed on occasions different from one another, the burden shifts to the defendant to establish the convictions were unconstitutional.

*United States v. Miles,* 290 F. 3d 1341 (11th Cir. 2002).

In *Miles,* the sentencing court found that Miles had committed the requisite three prior convictions for "violent felonies." *Id.* at 1347. However, the court did not articulate on the record the basis for finding that the offenses were committed on separate occasions. *Id.* at 1348. The appellate court held that the district court had not made sufficient factual findings, and ordered the matter remanded for resentencing. *Id.* at 1347. In the instant case, the court also failed to make a factual determination that the 924(e) predicate offenses were committed on occasions different from one another. Doc. 81. Without this determination the statutory maximum is ten years in prison. The case should be remanded for resentencing consistent with the district court's findings.

## *CONCLUSION*

In conclusion, Mr. Watts requests this Court to remand this case for resentencing with instructions not to sentence him as an armed career criminal. Alternatively, Mr. Watts requests this Court remand this case with instructions to have Mr. Watts resentenced before a jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DARIAN WATTS,
Petitioner,
vs.
UNITED STATES
OF AMERICA,
Respondent. /

Case No. 8:04-CR-286 MAP
[8:07-cv-665]

**PETITIONER'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF RELIEF REQUESTED PURSUANT TO TITLE 28 U.S.C. § 2255**

COMES NOW the Petitioner, DARIAN WATTS, pro se pursuant to 28 U.S.C. §2255, and files this memorandum of law in support to the relief requested for violations of Title 18 U.S.C. Sections 922(g)(1) and 924(e).

Petitioner brings his clams without the formal training in the legal drafting as an attorney, and accordingly asks for "liberal construing of the pleading." *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

**STATEMENT OF FACTS**

One June 3, 2004, Petitioner was arrested as a result of a criminal complaint issued that same day form the Honorable Magistrate Judge Mark A. Pizzo. (Doc. 1).

On June 30, 2004, Petitioner was finally taken to his initial appearance hearing held before the Honorable Elizabeth A. Jenkins. (Doc. 3). On that same day, the court appointed a federal public defender to represent Petitioner and further ordered that Petitioner be temporary detained. (Doc. 5 & 6).

On or about July 6, 2004, Attorney Timothy Fitzgerald filed his notice of appearance to represent Petitioner in the instant case. (Doc. 8).

Thereafter, Attorney Fitzgerald visited Petitioner at the Pinelles County Jail. At this time, Petitioner informed counsel that he (Petitioner) had bee placed in custody for approximately one month and no indictment had been issued.

Counsel then informed Petitioner that he would file a motion to have the complaint filed against Petitioner dismissed pursuant to a violation of 18 U.S.C. §3161(b), which counsel actually filed on August 2, 2004. (Doc. 11, *See* Exhibit "1").

However, without any consultation with Petitioner on any plausible argument, on August 5, 2004, counsel, without the consent of Petitioner, moved to withdraw the previous filed motion to dismiss complaint for a Title 18 U.S.C. §3161(b) violation. (Doc. 12, Exhibit "2").

Although counsel's motion to withdraw conceded that the government filed the indictment timely in this case, counsel nevertheless failed to submit

exactly the actual date of Petitioner's arrest. *See* Exhibit 2, ¶3.

The sole count of the indictment alleged that on May 23, 2004, Petitioner possessed a firearm after previously being convicted of a felony, in violation of Title U.S.C. §922(g)(1) and §924(e). (Doc. 13).

On August 16, 2004, Petitioner entered a plea of not guilty. (Doc. 18).

The case proceeded to trial on January 10, 2005. (Doc. 77). After the government rested its case, Petitioner moved pursuant to Federal Rules of Criminal Procedure, Rule 29, for a judgment of acquittal. (Doc. 77). Among other grounds, Petitioner moved for a judgment of acquittal based on the government's failure to prove that the Petitioner had previously been convicted of three violent felonies which occurred on separate occasions, in violation of Title 18 U.S.C. §924(e). (Doc. 78, pg. 4). This motion was denied, as was Petitioner's renewed motion for judgment of acquittal following the conclusion of Petitioner's case-in-chief. (Doc. 78, pg. 6, 13).

On January 11, 2005, the jury found Petitioner guilty of possessing a firearm by a convicted felon. (Doc. 52).

On January 21, 2005, Petitioner filed a renewed motion for a Rule 29 judgment of acquittal, again alleging that the government failed to prove to the jury that he had previously had been convicted of three prior violent felonies. (Doc. 58). The district

court denied the renewed the motion for a Rule 29 judgment of acquittal. (Doc. 60). Petitioner was sentenced on April 15, 2005. (Doc. 63).

Prior to Petitioner's sentencing hearing, Petitioner objected to the Presentence Investigation report (PSI), which found Petitioner to be an armed career criminal, and Petitioner requested a jury trial on the issue. *See* PSI Addendum. The district court, over Petitioner's objections, and denying Petitioner's request for a jury trial, found Petitioner to be an armed career criminal pursuant to Title 18 U.S.C. §924(e). (Doc. 81, pgs. 22 & 23). The court sentenced Petitioner as an armed career criminal to 210 months in prison. (Doc. 64). Petitioner filed a timely notice of appeal. (Doc. 66).

Following the direct appeal in this case, on or about February 18, 2007, Petitioner received the actual arrest history of this case from the Hillsborough County Sheriff's Office. *See* Exhibit "3".

The arrest report revealed that Petitioner was initially arrested and charged under Booking No. 04032854, on March 23, 2004, and that after the State of Florida dropped the charges, Petitioner was rearrested on the criminal complaint under Booking No. 04035200, on June 3, 2004.

Thereafter, on March 5, 2007, Petitioner forwarded Attorney Fitzgerald a written communication informing him of the facts overlooked in this case. In the written communication, it was also requested that attorney Fitzgerald file a Section 2255 motion in

this case as a result of counsel's errors. *See* Exhibit "4".

On March 8, 2007, Petitioner received a response back from Mr. Fitzgerald informing Petitioner to file his §2255 motion as soon as possible. However, in his response, Mr. Fitzgerald failed to provide any explanation for his moving to withdraw Petitioner's motion to dismiss without investigating the facts of the case first. *See* Exhibit "5".

## INEFFECTIVE ASSISTANCE OF COUNSEL

In the context of an ineffective assistance of counsel claim, the issue is whether Petitioner was deprived of adequate and effective assistance of counsel in accordance with his Sixth Amendment rights. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1094), where the United States Supreme Court held that in order to establish a constitutional violation of the right to effective assistance of counsel, Petitioner must meet two prongs. First, he must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to a defendant by the Sixth Amendment. This prong is met by showing that counsel's omissions did not meet an objective standard of reasonableness.

Second, a Petitioner must show that he was prejudiced by counsel's performance. The second prong of the test is met by showing the existance of a

reasonable probability that, but for counsle's deficient performance, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

In this case, it cannot be reasonable argued that counsel's performance did not fall below a reasonable objective, that was prejudicial to the Petitioner, when counsel failed to challenge the use of the ACCA offender application and the nature of Petitioner's prior convictions at sentencing, in light of the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004); and, *United States v. Booker*, 125 S.Ct. 738 (2005). Because these decisons laid the foundation for the arguments claimed in the instant petition, counsel was obligated to make the appropriate objections at sentencing, and as a result of counsel's failure to do so, Petitioner was clearly prejudiced. *See United States v. Pipkins*, 412 F.3d 1251 (11th Cir. 2005) ("holding that although argument defendant sought to raise in supplemental brief was foreclosed by circuit precedent at the time of initial appeal brief, defendant still had to raise issue in initial brief arguing prior precedent was wrongly decided.")

Although this circuit has not agreed that the existance of prior convictions and ACCA offender enhancements must be charged in indictments and proven to a jury beyond a reasonable doubt in light of *Apprendi*, *Blakely*, and *Booker*, nevertheless, as of

this date, the United States Supreme Court has not agreed with this circuit's analysis of prior convictions and counsel should have argued the issue. *United States v. Holland*, 380 F.Supp.2d 1279 (M.D. Fla. 2005) ("holding

**CLAIM ONE:**

**COUNSEL WAS INEFFECTIVE WHEN COUNSEL ERRONEOUSLY WITHDREW PETITIONER'S MOTION TO DISMISS COMPLAINT FOR TITLE 18 U.S.C. §3161(b) VIOLATION WITHOUT INVESTIGATING FACTS OF THE CASE**

Under the Speedy Trial Act, the government must indict a defendant within thirty days from the date on which the defendant was arrested or served with a summons. 18 U.S.C. §3161(b).

If an indictment is not filed within the Act's time limit, the charges against the individual that were contained in the criminal complaint "shall be dismissed." 18 U.S.C. §3162(a)(1); *see also United States v. Derose*, 74 F.3d 1177, 1183 (11th Cir. 1996) (explaining that when the indictment violates the Speedy Trial Act, a court generally should dismiss "only the charge[s] contained in the criminal complaint"). The court must then determine to dismiss the charges in the complaint with or without prejudice. The facts of this case are clear in that Petitioner was arrested on the criminal complaint on July 21, June 3, 2004, and the indictment was not filed by the government until July 21, 2004. Because

the indictment was returned in this case nearly 48 days after Petitioner's arrest, it is beyond dispute that a competent attorney familiar with the facts of this case would not have withdrew the motion to dismiss in light of the Title 18 U.S.C. §3161(b) violation.

The only question now left is whether the indictment should have been dismissed with or without prejudice. In making this decision, the court must consider three factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of the Act and on the Administration of justice. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984). "[W]here the crime charged is serious, the court should dismiss [with prejudice] only for a correspondingly severe delay." *Russo*, 740 F.2d at 1267. Therefore, Petitioner's indictment should be dismissed for the following reasons:

1. **Seriousness of Offense**

Because the fact finding elements of the offense in that Petitioner was convicted carries from no prison time to 10 years imprisonment, it cannot be argued that the crime is a serious offense. *See* 18 U.S.C. §922(g)(1). It also should be noted that the charge was previously dropped by the State of Florida and, therefore, could not have been to be considered a serious offense.

**2. Facts and Circumstances Leading to the Dismissal**

Because the government was well aware of the fact that defense counsel's motion to withdraw the dismissal of the indictment contained erroneous facts and the government failed to correct the fact that the indictment was not timely filed as required by 18 U.S.C. §3161(b), a dismissal of the indictment without prejudice would clearly be prejudicial to Petitioner. As argued in counsel's motion to dismiss complaint, "A failure to dismiss the case with prejudice will allow a third arrest of Petitioner for the same conduct. And because all allegations in the complaint were witnesses of law enforcement the 18 day delay was not necessary." Additionally, a retrial would be prejudicial to Petitioner at this point where as to a passage of time since the violation, witnesses Petitioner would be able to call, may have an elapse of memory due to the passage of time, and all to no fault of Petitioner.

**3. Impact of Reprosecution On the Administration of the Act and on the Administration of Justice**

As argued above, because all of the witnesses in the complaint were law enforcement, there was no reason for the 18 day delay in filing the indictment. The unreasonable delay by the government in bringing the indictment would in no question have an impact of reprosecution on the administration of the Act and on the Act and on the administration of

justice, as to the prejudice Petitioner would receive in a reprosectuion of the instant offense. Also, as explained above, because the State of Florida already found that the charges were not so serious that they dropped them and failed to reseek prosecution, this fact demonstrates that the indictment should be dismissed with prejudice for the unreasonable delay in indicting Petitioner.

Because counsel failed to investigate the facts of this case before filing the motion to withdraw the dismissal of the complaint, counsel's actions were ineffective that caused undue prejudice to Petitioner as presented herein and as a result, the indictment in this case must be dismissed with prejudice.

**CLAIM TWO:**

**THE TRIAL COURT ERRED BY SENTENCING PETITIONER[1] AS AN ARMED CAREER CRIMINAL IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHTS**

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[1] Although Petitioner concedes that this claim as raised on direct appeal, but because the holdings of *Apprendi*, *Blakely* and *Booker* cast doubt on the holding announced in *Almendarez-Torres* this court has authority to revisit this claim. *Messinger v. Anderson*, 225 U.S. 436, 444 32 S.Ct. 739, 56 L.Ed 1152 (1912) ("The courts are understandably reluctant to reopen a ruling once made . . . Reluctance, however, does not equal lack of authority. The constraint is a matter of discretion. So long as a case remains alive, there is power to alter or revoke earlier rulings." WRIGHT, MILLER & COOPER, FEDERAL PRACTICE and PROCEDURE: Jurisdiction: 2D §4478, at 637 (2002).

Petitioner was convicted following a jury trial of possession of a firearm by a convicted felon. The sole count in the indictment alleged a violation of both 18 U.S.C. §922(g) (possession of a firearm by a convicted felon), and a violation of 18 U.S.C. §924(e), the Armed Career Criminal Act. (ACCA). The ACCA, 18 U.S.C. §924(e)(1), provides a fifteen year mandatory prison sentence for a person who violates §922(g)(1) (possession of a firearm by a convicted felon), and who has three or more convictions for a violent felony, a serious drug offense, or both. The statute expressly requires that the prior offenses must have been committed on occasions different from one another.

Under 18 U.S.C. §924(e)(20(B), a "violent felony" is an offense that: (i) has as an element the use, attempted use, or threatened use of physical force; (ii) is burglary, arson, extortion, or other offenses involving conduct that presents a serious risk of physical injury to another. Under 18 U.S.C. §924(e)(2)(A)(ii), a "serious drug offense[s]" defined by the ACCA as certain drug offenses that are punishable by maximum term of imprisonment of ten years or more. Additionally, the ACCA cannot be applied in this case because the jury merely found that Petitioner possessed a firearm and was a convicted felon. The maximum penalty based upon the specific jury findings in the case is ten years. *See* 18 U.S.C. §922(g)(1).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, "Other than the fact of a prior conviction, any fact which increases the penalty beyond the prescribed statutory

maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 490. In *Apprendi,* the court additionally found that it was unconstitutional to remove from the jury's consideration the assessment of any facts that increase the prescribed range of penalties to which a criminal defendant is exposed. 520 U.S. at 491-92. The issue before the court in *Apprendi* involved the constitutionality of New Jersey criminal statutes that permitted an increased sentence if the offense was determined to be, in effect, a hate crime. *Id.*

Prior to finding the New Jersey statute unconstitutional in *Apprendi,* the Supreme Court decided *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998). In that case, the court held that a prior conviction need not be alleged in the indictment in order to trigger an enhanced statutory maximum under 8 U.S.C. §1326 for illegally reentering the United States after deportation. In so ruling, the court in *Almendarez-Torres* relied upon a principle seemingly rejected in *Apprendi*: "[An indictment] need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." 523 U.S. at 229, 118 S.Ct. at 1223. The premise of *Almendarez-Torres,* therefore, was not that prior convictions are different from other facts that are essential to punishment, but that any factual finding, that only impacts the sentence is not required to be alleged in the indictment and found by the jury beyond a reasonable doubt. This premise did not survive *Apprendi. See Blakely v. Washington,* 124

S.Ct. at 2253. ("[A]s *Apprendi* held, every defendant has the **right** to insist that the prosecutor prove to a jury all facts legally essential to punishment") (emphasis in original).

Of course, in order to find the New Jersey statute unconstitutional in *Apprendi,* it was not necessary to overrule *Almendarez-Torres*, because the facts relevant to the sentencing enhancement were not merely prior convictions. Rather than doing so in dicta, the *Apprendi* court excepted the fact of a prior conviction from its express holding. *See Apprendi,* 530 U.S. at 490. Although the *Apprendi* court did not overrule *Almendarez-Torres,* it signaled its inevitable demise, stating: "[I]t is arguable that *Almendarez-Torres* was incorrectly decided and that our reasoning today should apply if the recidivist issue were contested. *Apprendi,* 530 U.S. at 489-490. Indeed, *Apprendi* made no secret that it was retreating from the broader constitutional implications of *Almendarez-Torres,* describing it as "at best as an exceptional departure from the historic practice we have described." *Apprendi,* 530 U.S. at 487. *Apprendi* thus evidently recognized that *Almendarez-Torres* did not fit comfortably within its clarified understanding of the Sixth Amendment.

While awaiting the Supreme Court to readdress *Almendarez-Torres*, appellate courts have recognized the obvious difficulty in applying it after *Apprendi. See e.g., United States v. Davis,* 260 F.3d 965, 968 (8th Cir. 2001) (observing that "a close examination of Supreme Court cases casts doubt on the future

viability of *Almendarez-Torres.*"); *Jones v. Smith,* 231 F.3d 1227, 1235 (9th Cir. 2000) (concluding that "*Apprendi* calls *Almendarez-Torres* into serious question").

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Petitioner suggests that exempting recidivism findings from the *Apprendi* rule is not supported by logic. Indeed, it is supported only by *Almendarez-Torres* itself, a decision whose premise has been undermined by subsequent cases. *See Monge v. California*, 524 U.S. 721, 741, 118 S.Ct. 2246, 2257 (1998) (Scalia, J. dissenting) (describing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights").

Any continued reliance by the government on *Almendarez-Torres* was further undermined by the Supreme Court's recent decision in *Shepard v. United States,* 544 U.S. ___ 161 L.Ed. 2d 205, 125 S.Ct. 1254 (2005) (observing that in light of *Apprendi, Almendarez-Torres* does not authorize the sentencing court to resolve disputed facts as to whether a prior conviction is a qualifying prior for purposes of the Armed Career Criminal Act). *See Shepard,* 125 S.Ct. at 1262-1263. Concurring in *Shepard*, Justice Thomas acknowledged that "a majority of this Court

now recognizes that *Almendarez-Torres* was wrongfully decided." *Id.* at 1464 (Thomas, J., concurring). Indeed, Justice O'Connor, whose dissent in *Blakely v. Washington,* 124 S.Ct. 2531, 2558-2560 (2004) foreshadowed the demise of the mandatory Sentencing Guidelines, recognized that the majority in *Shepard* had engrafted, for the first time, an *Apprendi* requirement on recedivist enhancements:

> [I]t is one thing for the majority to apply its *Apprendi* rule within its own bounds, and quite another to extend the rule into new territory that *Apprendi* and succeeding cases had expressly and consistently disclaimed. Yet today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations, which until now have been safe from such formalism.

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*Obviously, Petitioner recognizes that this court lacks* the authority to overrule *Almendarez-Torres,* regardless of how inevitable it is that the Supreme Court will do so at the first opportunity. *See United States v. Thomas,* 242 F.3d 1028, 1034-1035 (11th Cir. 2001) (refusing to reconsider the holding in *Almendarez-Torres* in light of the "very basic fact that we cannot overrule Supreme Court decisions"). However, the foregoing cases make clear that the reasoning of *Almendarez-Torres* has been "gravely wounded" by subsequent decisions of the Supreme Court. Therefore, this court should not strain to expand the reach of *Almendarez-Torres* beyond its

express holding. Cf. *Jefferson County v. Acker,* 210 F.3d 1317, 1320 (11th Cir. 2001)("[I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us – if it cannot be said that decision 'directly controls' our case-then we are free to apply the reasoning in later Supreme Court decisions to the case at hand. We are not obligated to extend by even a micron a Supreme Court decision which that court itself hs discredited.").

In *Almendarez-Torres,* the defendant admitted to the existence of the prior convictions during his plea colloquy. *See Almendarez-Torres,* 523 U.S. at 227, 118 S.Ct. at 1222. ("At a hearing, before the district court accepted his plea, Almendarez-Torres admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies."). Therefore, *Almendarez-Torres* was limited to the Fifth Amendment rights to indictment, due process, and notice, and did not address the Sixth Amendment right to a jury trial. *Id. See also, Apprendi,* 530 U.S. at 488. (Noting that, because *Almendarez-Torres* had admitted the earlier aggravated felony convictions during plea colloquy, no question concerning the right to jury trial or standard of proof would apply).

Unlike in *Almendarez-Torres* Petitioner **did not** stipulate to anything. Therefore, these alleged prior convictions were not removed from the facts that were required under *Apprendi* to be proven to a jury

beyond a reasonable doubt. Therefore, even if the offenses alleged in the indictment by the government had been sufficient to trigger the ACCA, the sentencing court could still not increase Petitioner's 10 year maximum sentence and increase the guideline range beyond the statutory maximum established by the jury's verdict, based upon judicial fact-finding, without violating his Sixth Amendment right to a jury trial. Petitioner has a Sixth Amendment right to have a jury determine if he has three prior convictions that qualify as "violent felonies" under the ACCA and if those prior convictions occurred on occasions different from one another.

While the Eleventh Circuit has held *Almendarez-Torres* to remain law even post-*Shepard*, its rationale still allows Petitioner relief. In *United States v. Orduno-Mireles*, 405 F.3d 960, 962 (11th Cir. 2005), the court held that every fact other than a prior conviction, which increases the statutory maximum must be proven to a jury because a prior conviction must itself be established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. However, Petitioner's sentence was not enhanced merely by prior convictions. It was enhanced by a judicial determination that the prior convictions occurred on "occasions different from one another." Petitioner has a right for a jury to determine if his prior convictions occurred on "occasions different from one another." There has not been an establishment that the procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees for

this element have been met. Petitioner is entitled to a jury trial on the existence of his prior convictions, the nature of his prior convictions, and whether they occurred on occasions different from one another.

**CLAIM THREE:**

**THE TRIAL COURT ERRED IN FINDING THAT A CONVICTION FOR CARRYING A CONCEALED WEAPON QUALIFIED AS A VIOLENT FELONY UNDER ARMED CAREER CRIMINAL ACT**

The district court found Petitioner to be an armed career criminal in part by finding that a conviction for carrying a concealed firearm was a violent felony under 18 U.S.C. §924(e). Petitioner objected to this finding, arguing that carrying a concealed firearm was not a violent felony. The court overruled the objection. This circuit has previously held that carrying a concealed firearm is a violent felony under §924(e) and U.S.S.G. §4B1.4. *United States v. Hall,* 77 F.3d 398 (11th Cir. 1996). However, Petitioner contends that merely carrying a concealed weapon is not a violent felony, as it is not conduct that poses a serious potential risk of physical injury. Petitioner raises this argument for the record, acknowledging the adverse authority herein. *See United States v. Flores,* No. 06-1152 (6th Cir. Feb. 23, 2007).

In a recent opinion by Judge Richard Allen Griffin, the Sixth Circuit sided with the Eigth and declared that "the crime of carrying a concealed

weapon does not involve such 'conduct that presents a serious potential risk of physical injury to another' that a conviction . . . should properly be considered a conviction for a violent felony under the ACCA."

The court pointed out that §924(e)(2)(B)(ii) identifies "burglary, arson, or extortion, [or] use of explosives" as examples of conduct that presents "serious potential risk of physical injury" and it noted that each of those crimes involves "affirmative and active conduct that **is not** inherent in the crime of carrying a concealed weapon." More tellingly,", the court added, the statute provides that it is the "use", as opposed to the "possession", of explosives that qualifies as a violent felony.

Although the Eleventh Circuit has not reviewed such argument, Petitioner seeks to preserve this claim as it is anticipated that the United States Supreme Court will resolve the circuit split in the near future.

**A. <u>Ineffective Assistance of Counsel</u>**

At sentencing and on appeal, counsel in this case did, in fact, contest the application of the ACCA as to the use of, carrying a concealed weapon, as not a qualifying prior conviction udner the ACCA. However, counsel failed to argue the analysis reached by the Sixth Circuit as to the specific context of §924(e)(2)(B)(ii), in that carrying a concealed weapon does not present affirmative and active conduct as provided in that provision, the carrying of a concealed

weapon is not a qualifying predicate for the ACCA. Because counsel failed to present this specific argument, his assistance was ineffective and prejudiced Petitioner as well. Therefore, Petitioner is entitled to be resentenced absent the ACCA to a term of imprisonment not to exceed 10 years as provided in 18 U.S.C. §922(g)(1).

**CLAIM FOUR:**

**PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, AT SENTENCING WHEN COUNSEL FAILED TO OBJECT TO THE NATURE OF PETITIONER'S PRIOR CONVICTIONS AND THAT SUCH PRIOR CONVICTIONS DID NOT QUALIFY FOR THE ACCA AS MANDATED UNDER THE PROCEDURES ANNOUNCED IN *TAYLOR* AND *SHEPARD***

In *Taylor v. United States,* 495 U.S. 575 (1990), and, *Shepard v. United States*, 544 U.S. 13 (2005), the Supreme Court set standards to determine whether a prior conviction can be used to enhance a Petitioner's sentence. There exists two approaches to determine whether a prior conviction is a violent or qualifying felony under the Career Offender provision. The approaches are the "categorical approach" and the "modified approach", both of which were sanctioned in *Taylor*. *Taylor*, 495 U.S. at 602. Under the categorical approach, "federal courts do not examine the facts underlying the prior offense, but 'look only to the fact of conviction and the statutory definition of

the offense. *United States v. Corona-Sanchez,* 291 F.3d 1201, 1203 (9th Cir. 2002) (en banc) (quoting *Taylor,* 495 U.S. at 602, 110 S.Ct. at 2143'". Under the "modified approach", the court may consult limited categories of documents to determine whether the facts underlying the conviction necessarily established that the Petitioner committed the generic offense. *Taylor,* 495 U.S. at 602, 110 S.Ct. at 2160.

In this case, Petitioner argues that had counsel made the proper objections under the two approaches, the district court would have concluded that Petitioner's prior convictions were not predicates for the armed career offender provision. Therefore, Petitioner should be resentenced with effecitve assistance of counsel, without the armed career offender enhancement being applied to his case as a result of counsel's deficient performance, because the "**nature**" and not the "fact" of Petitioner's prior convictions would have qualified the relief requested.

## CONCLUSION

**WHEREFORE,** from the Laws submitted herein, Petitioner prays that this Honorable Court will find that the indictment should be dismissed with prejudice or, alternatively, Petitioner should be resentenced absent the ACCA, or for any other relief this court deems just and proper in this premise.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

This 11 day of April, 2007.

Respectfully Submitted,

/s/ Darian Watts

Darian Watts, Pro Se
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FCC – Medium (C-2)
P.O. Box 1032
Coleman, FL 33521-1032

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DARIAN ANTWAN WATTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent. /

Case No.
8:04-Cr-314-T-24MAP
8:07-Cv-665-T-24MAP

**NOTICE OF APPEAL AND APPLICATION FOR CERTIFICATE OF APPEALABILITY**

(Filed Sept. 17, 2007)

COMES NOW, Petitioner, Darian Antwan Watts, pro se, notifying this Honorable Court of his intent to appeal the denial of his §2255 motion entered on June 26, 2007, and also the denial of his motion for reconsideration, pursuant to Fed.R.Civ.P. 59(e), entered on July 16, 2007. (Doc. No's. 10 & 13). Petitioner also requests this Honorable Court to issue a Certificate of Appealability as to the following issues:

**GROUND ONE**

**DISTRICT COURT ERRED IN FAILING TO FIND COUNSEL'S PERFORMANCE DEFICIENT WHEN COUNSEL ERRONEOUSLY WITHDREW PETITIONER'S VALID SPEEDY TRIAL MOTION WHEN INDICTMENT WAS RETURNED IN VIOLATION OF TITLE 18 U.S.C. §3161(b)**

**GROUND TWO**

**IN LIGHT OF RECENT SUPREME COURT'S DECISION ANNOUNCED IN *JAMES V. UNITED STATES*, ___ S.Ct. ___ (2007), A PRIOR CONVICTION FOR CARRYING A CONCEALED FIREARM FALLS OUTSIDE THE "VIOLENT FELONY" OFFENSE DEFINED WITHIN §924(e)(2)(B)(ii)**

WHEREFORE, Petitioner prays this Honorable Court filed his Notice of Appeal, and issue a Certificate of Appealability for the foregoing issues, and for such other relief as this court deem just and proper in this premise.

This 13 day of September,

2007

Respectfully Submitted,

/s/ Darian Antwan Watts
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been provided to the Office of the U.S. Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, via first class U.S. Mail, postage prepaid, this 13 day of September, 2007.

/s/ Darian Antwan Watts
DARIAN ANTWAN WATTS,
PRO SE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DARIAN ANTWAN WATTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent. /

Case No.
8:04-Cr-314-T-24MAP
8:07-Cv-665-T-24MAP

**MOTION FOR RECONSIDERATION AS PROVIDED IN FEDERAL RULES OF CIVIL PROCEDURE, RULE 59(e)**

COMES NOW, Petitioner, DARIAN ANTWAN WATTS, pro se requesting this Honorable Court to reconsider the facts of this Court's Order denying Petitioner's Title 28 U.S.C. §2255 motion under the Federal Rules of Civil Procedure, Rule 59(e). The Petitioner argues that the instant motion should be granted for the following reasons:

## GROUND ONE

## COUNSEL ERRONEOUSLY WITHDREW PETITIONER'S VALID SPEEDY TRIAL VIOLATION MOTION WHEN INDICTMENT WAS RETURNED IN VIOLATION OF TITLE 18 U.S.C. § 3161(b)

As this Court correctly found in the Order denying Petitioner's motion for relief under 28 U.S.C. §2255, "In order to trigger the thirty day time limit under the Federal Speedy Trial Act (the Act), both a federal complaint and a federal arrest and/or federal summons are required. An 'arrest', under the Act, consists of a federal arrest on a federal charge. A federal complaint and federal detainer filed against a defendant in state custody does not constitute an 'arrest' for purposes of the Act. Thus, the thirty-day speedy trial period never begins to run against a defendant who is subject of a federal complaint, arrest warrant, and detainer while in state custody until he is placed under federal arrest." Citing *United States v. McGrier*, 848 F.Supp. 649 (S.D.W.Va. 1994), decision aff'd, 55 F.3d 144 (4th Cir. 1995) and aff'd, 891 F.3d 135 (4th Cir. 1996). *See* Doc. No. 10 at pg. 6.

While the Court correctly noted that the Petitioner was arrested and detained by state authorities on May 23, 2004, released on a surety bond on May 24, 2004, and then re-arrested on June 3, 2004, the June 3, 2004 re-arrest, however, was by federal authorities, *not state*, and was held under a federal

detainer.[1] *See* Exhibit "A". Although at the time of the federal arrest on June 3, 2004, Petitioner was additionally arrested on state charges, those charges were all resolved and/or dismissed by the state as a result of the federal complaint all on June 17, 2004. Specifically, on June 7, 2004, Petitioner received ten (10) days county jail time with time credit from June 3, 2004, as a result of the possession of marijuana offense in Case No. 04-CM-12317 which was a part of the June 3, 2004 arrest. *See* Exhibit "B", attached. Thereafter, on June 14, 2004, the State of Florida dismissed all of the remaining charges from the June 3, 2004 arrest as a result of the federal criminal complaint. *See* Exhibit "C".

Therefore, it is the argument of the Petitioner that the government, at the very most, had until July 14, 2004 to file a timely indictment in this case to be valid pursuant to 18 U.S.C. §3161(b), because the record in this case is beyond dispute that Petitioner was not being held on any other state charges after the State of Florida dismissed the charges against Petitioner as a result of the pending federal complaint on June 14, 2004.

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[1] The arresting officer was John Armao.

## GROUND THREE

## A PRIOR CONVICTION FOR CARRYING A CONCEALED FIREARM IS NOT A VIOLENT FELONY AS DEFINED IN THE ACCA

As the U.S. Supreme Court recently established in the case of *James v. United States*, 81 CrL 88 (U.S. 2007), that if a prior offense does not fall within the specific violent offense definitions as found in §924(e)(2)(B)(ii), the district court should look to the closet enumerated offense to conclude whether the prior offense presents a serious potential risk of physical injury to another, where the court said:

> "The specific offenses enumerated in [the residual provision] provide one baseline from which to measure whether other similar conduct 'otherwise. . . . presents a serious potential risk of physical injury'. In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closets analog among the enumerated offenses – here, completed burglary."

Petitioner asserts that using this analogy from *James*, since carrying a concealed firearm is not defined within §924(e)(2)(B)(ii), the closets enumerated offense would be a State of Florida's conviction for felon in possession of a firearm, and since this Court has previously held that such conviction is not a crime of violence as defined in the ACCA, this Court should find that under *James*, it

was error to clasify Petitioner's prior conviction as a crime of violence. *United States v. Davis*, ___ F.3d ___ (5th Cir. 2007) (acknowledging that *James* articulated a new test for determining whether a prior offense falls within the ACCA's catch-all clause of §924(e)(2)(B)(ii)).

**a. Ineffective Assistance of Counsel**

Additionally, as Petitioner argued in his initial §2255 motion, because counsel did not raise the specific argument demonstrated above, his assistance fell below a reasonable standard of objectiveness. Specifically, on direct appeal, the Eleventh Circuit found that Petitioner was not entitled to any relief because carrying a concealed firearm was a crime of violence within the definition of the ACCA. Citing *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996). However, because in *Hall* the defendant never raised the specific argument as raised herein (that the court must use a different categorical approach to determine whether or not a prior conviction falls within §924(e)(2)(B)(ii) when the prior offense is not in the specific definitions of that subsection), it cannot be reasonably argued that the issue raised herein was raised on direct appeal or resolved in *Hall*.

In concluding, the Petitioner asserts that reconsideration of this claim should be given where the fact remains that the *Hall* court did not have the benefit of *Shepard v. United States*, 544 U.S. 13 (2005), or *James v. Untied States*, ___ U.S. ___ (2007),

and if the court did have those decisions at the time of the ruling, the court could not have reached the same conclusion, therefore, in the interest of justice, this Court should resolve the issue.

Moreover, this Court should further reconsider whether the State of Florida's carrying a concealed firearm conviction is a crime of violence within the ACAA, where the State of Florida was the State of Michigan, has passed a law after Petitioner's conviction, allowing qualifying citizens to carry concealed firearms. Furthermore, it is inconceivable that the Florida Legislature would pass a law that condones the involvement of conduct that creates and carries a "serious potential risk of physical injury to another." *United States v. Flores*, 477 F.3d 431 (6th Cir. 2007) (taking into consideration that the State of Michigan passed a law that allows citizens to carry concealed firearms, therefore a prior conviction of carrying a concealed firearm does not qualify as a "violent felony" within the ACCA).

## CONCLUSION

WHEREFORE, after due consideration, Petitioner's prays that the instant motion be granted.

Respectfully Submitted,

/s/ Darian Antwan Watts

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Reconsideration has been provided to the below named individual on this 7 day of July, 2007, via first class U.S. Mail, postage prepaid:

Eduardo E. Toro-Font
Asst. U.S. Attorney
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By:

/s/ Darian Antwan Watts

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